An English Translation And Commentary
On The Chapters Relating To Islamic Commercial Law From

مختصر القدوري

Mukhtaṣar al-Qudūrī

Imām Abū l-Ḥusayn Aḥmad ibn Muḥammad Al-Qudūrī

Fahim Hoosen

Contents

Imām al-Qudūrī

The eminent jurist of Baghdad, the Imām Abū l-Ḥusayn Aḥmad ibn Muḥammad ibn Aḥmad ibn Jaʿfar ibn Ḥamdān (may Allah have mercy on him,) famously known as Al-Qudūrī[1], was born in the year 362 AH 973 CE in a family of learning and piety.

He studied *fiqh* (Islamic jurisprudence) under Abū ʿAbdullāh Muḥammad ibn Yaḥyā al-Jurjānī who was the student of Imām Abū Bakr al-Rāzī. Among the jurists that learned *fiqh* at his hands was Abū al-Naṣr Aḥmad ibn Muḥammad al-Aqṭaʿ.

He narrated ḥadīth from Muḥammad ibn ʿAlī ibn Suwayd al-Muʾaddib and ʿUbaydullāh ibn Muḥammad al-Ḥawshabī. The chief justice (*qāḍī al-quḍāt*) Abū ʿAbdullāh al-Dāmaghāni narrated ḥadīth from him, and so did al-Khaṭīb al-Baghdādi.

Imām al-Qudūrī distinguished himself in *fiqh* due to his intelligence. He went on to become the leader of the Ḥanafī scholars in Iraq and rose amongst them in status and fame. He was from the *Asḥāb al-Tarjīḥ* i.e. jurists who analysed the strength of differing verdicts in the school and were qualified to give preference to one over the other.

He was well-spoken in his views with a bold tongue and was constant in reciting the Qurʾān.

The Imām passed away on Monday, the fifteenth of Rajab 428 AH. He was buried soon after in his home and was later moved to a cemetery in Al-

[1] Some say that Al-Qudūrī is ascribed to one of the outlying towns of Baghdad called Qudūr. Others are of the view that he is ascribed to his family profession which was the selling of pots (from the Arabic word for pot *qidr pl. qudūr*).

Manṣūr Street, where he was laid to rest beside the Ḥanafī jurist Abū Bakr al-Khawārizmī.[2]

[2] *Al-Jawāhir al-Muḍīʾa* pg. 247-250, 1993, Hajr Publishers, Giza.

The *Mukhtaṣar*

Mukhtaṣar, in Islamic jurisprudential literature, refers to a concise handbook of legal treatises, characterized by neatness and clarity. *Mukhtaṣars* originated during the Abbasid caliphate and were created as a method to facilitate the quick training of legal scholars without the repetitiveness of lengthy volumes. They later evolved into a mode of access to the fundamentals of Islamic law for the educated layperson.[3]

This brief work of Imām al-Qudūrī, known as *Al-Mukhtaṣar* and commonly referred to within the Ḥanafī school as *Al-Kitāb* (the Book), is one of the most widely accepted Ḥanafī texts used for the study of the school up to this day.

Imām al-Marghīnānī, one of the great jurists of the Ḥanafī School and the author of the famous and widely acclaimed *Al-Hidāya*, described the book of al-Qudūrī as the "most beautiful book in the most concise form."

Imām al-Kafawī, Imām al-Qurashī and others have described it as the "blessed *mukhtaṣar.*"

The author of *Miṣbāḥ Anwār al-Adʿiyah* writes:

> "The Ḥanafīs would seek blessing by reading *Mukhtaṣar al-Qudūrī* during times of plague, for it is a blessed book. Whoever memorizes it will be safe from poverty, to the extent that it is said: Whoever studies it under a righteous teacher, and supplicates upon its completion that he be showered with blessings, will become the owner of the number of dirhams equal to the number of legal cases (*masāʾil*) the book covers – and according to a commentator of *al-Majmaʿ*, the book covers 12,000 legal cases."

[3] John Esposito, The Oxford Dictionary of Islam, Oxford University Press 2003

The author, Imām al-Qudūrī, arranged the book into 63 chapters – beginning with the chapters concerning acts of worship (commencing with the chapter on purity) and ending with the chapter on inheritance. This commentary, however, only includes the chapters on commercial transactions (*kitāb al-buyūʿ*).

Numerous commentaries have been written on the *Mukhtaṣar*, the most famous among them being *al-Jawhara al-Nayyira* of al-Ḥaddādī, *Khulāṣa al-Dalāʾil* of Ḥusām al-Dīn al-Rāzī, *Zād al-Fuqahāʾ* of al-Isbījābī and *Al-Lubāb fī Sharḥ al-Kitāb*[4] of Al-Maydānī - who was a student of the great Ḥanafī jurist ibn ʿĀbidīn al-Shāmī. The author of *Kashf al-Ẓunūn* has mentioned many others. Ibn ʿĀbidīn himself in his *Radd al-Muḥtār* also makes direct or indirect references to a number of other commentaries.

[4] This Arabic commentary is commonly available nowadays and has recently (in 2010) been published by Dar al-Bashair Al-Islamiyya in six volumes edited by Dr. Sai'd Bakdash. The first volume of this edition contains a detailed introduction to the commentary as well as the *Mukhtaṣar* itself and is highly recommended for a student to read.

Preface

The intention in compiling this brief commentary on the section of commercial law (*Kitāb al-Buyūʿ*) from the *Mukhtaṣar* of Imām al-Qudūrī is to assist the novice in understanding the various *fiqhī* terminologies and concepts in the manner laid down by the classical authors on Ḥanafī jurisprudence. A firm grasp of these fundamental concepts in the initial years of study will lay a solid foundation for a student to later build upon in more detailed books and also when applying his mind to contemporary issues of commercial law.

I have attempted to convey the explanation of the *masāʾil* and indicate the background reasoning in a simple manner without excessive reference to technical jurisprudential terminology, generally used by Arabic commentators, leaving this for the student to discover directly from these commentaries themselves or in later studies.

Technical discussions relating to the difference of opinions amongst the *mujtahid* jurists, within and without the Ḥanafī School, and textual evidence and arguments for and against such views have been avoided since these are not of immediate relevance to the beginner. In addition where differences of opinion amongst the Ḥanafī scholars are mentioned in the text or the commentary, generally no attempt has been made to identify the *muftā bihī* view in the school. For this a qualified Muftī should be consulted.

I have also avoided a detailed explanation of contemporary adapted applications of some commercial concepts (such as Murābaḥa in Islamic Finance) as these are structured arrangements that consist of various transactions associated to achieve a specific purpose, and may confuse the student as to the actual intent of such transactions in their classical form. However, I have sometimes made brief reference to some of these for purposes of awareness and correlation.

With respect to the text it must be noted that due to the numerous editions of the *Mukhtaṣar* that are available, which often differ from one another, I decided to use the text that was used in the Maktaba ʿUmariyya edition of *Al-Lubāb* edited by Bashshar Bakri as this was generally in line with the copies that are used for teaching purposes at *Dār al-ʿUlūm* institutions.

When translating the Arabic text I have attempted to remain as close to the source as possible, so as to assist the student in unravelling the Arabic syntax. In doing so the fluency of the English is sometimes compromised.

In compiling the footnotes no direct references have been indicated except occasionally. The reader is to note that generally the sources consulted were the *Al-Hidāya* of al-Marghīnānī and its various commentaries with particular reference to *Al-ʿInāya* of al-Bābartī as well as the *Al-Lubāb* of al-Maydānī. Any further clarity or verification of the points made in the notes may be obtained from these sources unless otherwise indicated.

I am grateful to Mawlāna Abdul Azeem Khan (CA) for having revised the text and commentary and for his valuable input and suggestions at the revision stage.

May Allah grant us the true understanding of religion and enable us to apply it correctly.

Fahim Hoosen
Durban, South Africa
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Note on Transliteration

The transliteration of Arabic words generally follows the International Journal of Middle East Studies (IJMES) system with the use of *aw* and *ai* for diphthongs instead of *au* and *ai*.

Diacritical dots are used to mark the emphatic consonants (ط-ظ-ص-ض) as well as (ح): ṭ-ẓ-ṣ-ḍ-ḥ.

The Arabic letters (ث-ذ-خ-ش-غ) are represented in Latin letters with the familiar simplified spelling *th, dh, kh, sh* and *gh.*

The Arabic *tāʾ marbūṭa* is rendered *a* not *ah*.

The *nisba* ending is rendered *-iyya* in Arabic (e.g., *miṣriyya*).

The initial *hamza* is always dropped.

The definite article *al-* is lowercase everywhere, except when the first word of a sentence.

Please refer to the transliteration key on the next page for quick reference.

Transliteration Key

ا	*ā*	ط	*ṭ*
ب	*b*	ظ	*ẓ*
ت	*t*	ع	ʿ
ث	*th*	غ	*gh*
ج	*j*	ف	*f*
ح	*ḥ*	ق	*q*
خ	*k* *h*	ك	*k*
د	*d*	ل	*l*
ذ	*d* *h*	م	*m*
ر	*r*	ن	*n*
ز	*z*	ه	*h*
س	*s*	و	*w, aw, ū*
ش	*sh*	ي	*y, ay, ī*
ص	*ṣ*	ء	ʾ
ض	*ḍ*		

كتاب البيوع
The Book of Commercial Transactions

البيع ينعقد بالإيجاب والقبول إذا كانا بلفظ الماضي

A sale[5] shall be contracted by means of offer and acceptance in the past tense.[6]

وإذا أوجب أحد المتعاقدين البيع فالآخر بالخيار إن شاء قبل في المجلس وإن شاء رده وأيهما قام من المجلس قبل القبول بطل الإيجاب

When one of the two contracting parties makes an offer of sale[7] the other shall have the option to either accept (it) in that contractual session (*majlis*) or reject it. If anyone of the two parties leaves the *majlis*[8] before the acceptance (is made) the offer shall become void.

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[5] A sale is defined in Sharīʿa as the 'exchange of one item of value for another item of value by mutual consent.'

[6] The restriction of the offer and acceptance to the past tense (*māḍī*) is for the avoidance of doubt in the Arabic language as the *muḍārīʿ* verb could refer to either the present or future tense. The key principle is that the words must clearly indicate the intention of the parties to contract the sale by mutual consent at the present time. Thus a sale can also be contracted by the mutual exchange of items, known as *taʿāṭī*, without the use of words.

[7] The offer may be made by either the seller or the purchaser.

[8] This applies when he terminates the contractual session even if he does not physically leave that place.

وإذا حصل الإيجاب والقبول لزم البيع ولا خيار لواحد منهما إلا من عيب أو عدم رؤية

Once the offer and acceptance take place the sale shall be binding and neither party shall have any option (of cancellation) except in cases of defect or non-sight.[9]

والأعواض المشار إليها لا يحتاج إلى معرفة مقدارها في جواز البيع
والأثمان المطلقة لا تصح إلا أن تكون معروفة القدر والصفة

There is no need to be aware of the quantity of items of exchange that are pointed out for the sale to be valid. However, if the price to be paid is not pointed out, its quantity and description must be known for the sale to be valid.[10]

ويجوز البيع بثمن حالّ ومؤجل إذا كان الأجل معلوماً

A sale may be concluded for a cash or deferred price[11] as long as the due date of payment is clearly known.

[9] Refer to the later chapters on the Option of Defect, Option of Stipulation and On Sight Option.

[10] Ambiguity (*jahāla*) that has the potential to lead to dispute will invalidate the sale e.g. ambiguity with regards to the purchase price of the item of sale.

[11] As long as the price of the item is fixed when the sale is concluded, it is also valid to offer a different price for payment in cash as opposed to deferred payment.

ومن أطلق الثمن في البيع كان على غالب نقد البلد فإن كانت النقود مختلفة فالبيع فاسد إلا أن يبين أحدها

If the price in a sale is unqualified it shall (automatically) default to the prevalent currency of that place.[12] However, if there are different currencies (in circulation) the sale shall be invalid unless one (currency) is clearly specified.

ويجوز بيع الطعام والحبوب مكايلة أو مجازفة وبإناء بعينه لا يعرف مقداره وبوزن حجر بعينه لا يعرف مقداره

The sale of wheat[13] and other grain may take place by measure of volume or by estimation.[14] The sale may also take place by measure of a specified container, the volume of which is not known, or by the weight of a specified stone, the weight of which is not known.

ومن باع صبرة طعام كل قفيز بدرهم جاز البيع في قفيز واحد عند أبي حنيفة إلا أن يسمى جملة قفزانها

If a person sells a heap of wheat "every *qafīz*[15] for one dirham" the sale shall be valid in (only) one[16] *qafīz* according to Imām Abū Ḥanīfa unless the total number of *qafīz*'s are stated.[17]

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[12] For e.g. If a person sells an item for 'ten' in South Africa without specifying the currency, it will default to ten South African rands.

[13] The Arabic word *ṭaʿām* (lit. food) has been translated as 'wheat' having regard to the usage of the term in the period of the author. (*Al-Lubāb*)

[14] *Mujāzafa* refers to a sale by estimation in which the volume or weight of the item sold is not known. It is valid to sell wheat and other grain in this manner as long as it is not sold in exchange for the same genus (e.g. wheat in exchange of wheat), in which case the quantity must be the same.

[15] *Qafīz* is a dry measure of volume equivalent to 12 *ṣāʿ* which is 40.344 litres or 39138 grams of wheat. (*Muʿjam Lughat al-Fuqahāʾ*)

ومن باع قطيع غنم كل شاة بدرهم فالبيع فاسد في جميعها وكذلك من باع ثوبا مذارعة كل ذراع بدرهم ولم يسم جملة الذرعان

If a person sells a flock of sheep "every sheep for one dirham" the sale of the entire flock shall be invalid.[18] Likewise, if a person sells a piece of cloth[19] by measure of length, "every cubit (*dhirāʿ*) for one dirham," but does not state the total number of cubits.[20]

ومن ابتاع صبرة طعام على أنها مائة قفيز بمائة درهم فوجدها أقل كان المشتري بالخيار إن شاء أخذ الموجود بحصته من الثمن وإن شاء فسخ البيع وإن وجدها أكثر فالزيادة للبائع

If a person purchases a heap of wheat with the stipulation that it is one hundred *qafīz* for one hundred dirhams and thereafter finds it less, the purchaser shall have the option of either taking the wheat that is present

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[16] Since the total number of *qafīz*'s in the heap is not known the total price is therefore ambiguous (*majhūl*). This ambiguity (*jahāla*) invalidates the sale of the entire heap. However because the price of one *qafīz* is known, the sale is valid in one *qafīz* only. The purchaser, however, has an option of not proceeding with the sale of the one *qafīz* due to the breakup of the transaction (*tafarruq al-ṣafqa*).

[17] Once the total number of *qafīz*'s are stated, the ambiguity is removed and the sale will become valid if this is done in the same contractual session. Likewise if the heap is measured in the same contractual session the sale will become valid as the ambiguity has been removed. Nevertheless, the purchaser in both instances shall have the option of not proceeding with the sale.

[18] The reason for the invalidity of this transaction is that the total number of sheep and the price payable are both ambiguous. The sale will not be valid even in one sheep due to the fact that sheep differ from one another unlike wheat (in the previous case.)

[19] This refers to a piece or roll of cloth that cannot be cut e.g. a rug or mat.

[20] The ambiguity in the total number of cubits as well as the price payable invalidates the sale. The sale will not even be valid in one cubit as the cloth cannot be cut.

for its proportion of the price[21] or cancelling the sale. If he finds the wheat to be more (than one hundred *qafīz*) the extra (wheat) shall be the seller's.[22]

ومن اشترى ثوبا على أنه عشرة أذرع بعشرة دراهم أو أرضا على أنها مائة ذراع بمائة درهم فوجدها أقل فالمشتري بالخيار إن شاء أخذها بجملة الثمن وإن شاء تركها وإن وجدها أكثر من الذراع الذي سمّاه فهو للمشتري ولا خيار للبائع

If a person purchases a piece of cloth with the stipulation that it is ten cubits for ten dirhams, or land with the stipulation that it is one hundred cubits for one hundred dirhams, and thereafter finds it less, the purchaser shall have the option of either taking it for the full price[23] or leaving it (i.e. not proceeding with the sale.) If he finds it to be more than the stated length the extra shall be for the purchaser[24] without any option for the seller.

وإن قال بعتكها على أنها مائة ذراع بمائة درهم كل ذراع بدرهم فوجدها ناقصة فهو بالخيار إن شاء أخذها بحصتها من الثمن وإن شاء تركها وإن وجدها زائدة كان المشتري بالخيار إن شاء أخذ الجميع كل ذراع بدرهم وإن شاء فسخ البيع

If the seller said, 'I sell it to you with the stipulation that it is one hundred cubits for one hundred dirhams, every cubit for one dirham,' and it is thereafter found to be less, the purchaser shall have the option of either taking it for the proportionate price or leaving it. If it is found to be more,

[21] Since wheat is an item that is sold by quantity i.e. measure of volume (e.g. *qafīz*) the price will decrease in proportion to the quantum of wheat present.

[22] The sale was concluded for a specific quantity, i.e. one hundred *qafīz* only, and thus the extra will have to be returned.

[23] A piece of cloth (e.g. a rug) is not sold by quantity, unlike wheat. The mention of length in the transaction is merely to provide a description of the cloth and the price will not decrease if this description is not met. Instead, the purchaser will be given the option not to proceed with the sale. The same applies to land.

[24] Since the sale was concluded on the whole cloth and not a specific quantity (thereof) the extra length will be included in the sale.

the purchaser shall have the option of taking the entire (land), every cubit for one dirham, or cancelling the sale.[25]

ومن باع دارا دخل بناؤها في البيع وإن لم يسمه ومن باع أرضا دخل ما فيها
وإن لم يسمه ولا يدخل الزرع في بيع الأرض إلا بالتسمية

If a person sells a property, the building on it shall be included in the sale even if he does not specifically mention it.[26] If a person sells land, whatever is on it[27] shall be included in the sale even if he does not specifically mention the same. Crops shall not be included in the sale of land unless specifically mentioned.[28]

[25] The original principle is that the mention of length is merely a description rather than a specific quantitative measurement. However, by the seller's addition of the terms 'every cubit for one dirham' this is changed to a sale of a specified quantity as per the intent of the seller. The price will therefore decrease or increase in proportion to the quantum of length. The purchaser, nevertheless, is given an option as he will have to either settle for less than what he initially set out to purchase (*tafarruq al-ṣafqa*) or he will have to pay more than he initially intended.

[26] Anything that is attached to the item of sale permanently, or is understood in common usage to be included in the word used for the item of sale (e.g. the word *dār* [property] in Arabic includes the land and the building), will be included in the sale by default and does not require specific mention in the contract.

[27] This refers to the date-palms or trees that are on the land as these are attached to it permanently.

[28] Since crops are not attached to the land permanently, nor are they understood to be included in the word 'land', they will not be included in the sale of land without specific mention.

ومن باع نخلا أو شجرا فيه ثمر فثمرته للبائع إلا أن يشترطها المبتاع ويقال للبائع اقطعها وسلم المبيع ومن باع ثمرة لم يبد صلاحها أو قد بدا جاز البيع ووجب على المشتري قطعها في الحال فإن شرط تركها على النخل فسد البيع

If a person sells a date-palm or (other) tree on which there are fruit, the fruit shall be the seller's unless the purchaser stipulates them.[29] The seller shall be instructed to cut the fruit and hand over the item of sale.[30]
If a person sells fruit, whether they are suitable for consumption or not, the sale shall be valid[31] and the purchaser must cut the fruit immediately. If the purchaser stipulates (in the sale contract) that the fruit will remain on the tree the sale shall be invalid (*fāsid*.)[32]

ولا يجوز أن يبيع ثمرة ويستثني منها أرطالاً معلومة

It shall not be valid[33] to sell fruit and exclude a specified number of *raṭls*.[34]

ويجوز بيع الحنطة في سنبلها والباقلاء في قشرها

The sale of wheat in its ear and beans in their pods shall be valid.[35]

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[29] The same principle applies here since the fruit are not attached to the tree permanently, nor are they understood to be included in the word 'tree'.
[30] i.e. the tree
[31] The validity of the sale is based on the fact that such fruit is deemed an item of value (*māl mutaqawwim*) as it may be utilized immediately or in the future.
[32] The stipulation that the fruit remain on the tree is invalid as it is a 'condition that the contract does not demand.' In addition there is benefit for one of the contracting parties (viz. the purchaser) in this stipulation. However if the fruit are sold without such stipulation, and thereafter the seller allows the purchaser to leave the fruit on the tree for a period (e.g. until the fruit ripen) this will be valid.
[33] The reason for this not being valid is that the quantity of the remainder of the fruit, after the exclusion, which is in effect the actual subject matter of the sale, is not known.
[34] *Raṭl* or *riṭl* is a measure of weight equivalent to 407,5 grams (*Muʿjam Lughat al-Fuqahāʾ*).
[35] Although the wheat or beans are concealed the sale shall be valid and the

ومن باع دارا دخل في المبيع مفاتيح أغلافها

The keys to the locks[36] shall be included in the sale of a property.

وأجرة الكيال وناقد الثمن على البائع وأجرة وزان الثمن على المشتري

The seller shall be liable for the fees payable to the measurer (of the goods sold) and to the examiner of the amount paid.[37] The purchaser shall be liable for the fees payable to the one who weighs the amount paid.[38]

ومن باع سلعة بثمن قيل للمشتري ادفع الثمن أولا فإذا دفع قيل للبائع سلم المبيع

ومن باع سلعة بسلعة أو ثمنا بثمن قيل لهما سلّما معًا

If a person sells goods in exchange for money the purchaser shall be instructed to hand over the money (payable) first. Once he hands over the money the seller shall be instructed to hand over the goods.[39] If goods are sold in exchange for goods, or money in exchange for money[40], the parties shall be instructed to make a simultaneous handover.

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purchaser will be granted the on sight option when he sees it.

[36] Locks that are permanently attached to the property, as well as the keys to these locks without which the locks are unusable, will be included in the sale of a property without specific mention of the same in the contract of sale.

[37] Since it is the seller's responsibility to hand over the goods sold to the purchaser in the correct quantity he will be liable for the fees payable for measuring out this quantity. Likewise the seller will be liable for any fees payable to any person that is hired to verify the quality of the coins handed over by the purchaser in exchange for those goods.

[38] Since it is the purchaser's responsibility to hand over the price payable in the correct quantity he will be liable for the fees payable for weighing out this quantity.

[39] The juristic principle is that 'money does not become specific in a sale transaction' until it is handed over. Thus, upon the conclusion of the sale by means of a valid offer and acceptance only the defined goods, which form the subject matter of the sale, become specific and the purchaser's right is linked to those goods. In order to ensure parity of specification the money will therefore have to be handed over first.

[40] E.g. in a currency exchange (*ṣarf*) transaction.

باب خيار الشرط
Chapter: Option of Stipulation[41]

خيار الشرط جائز في البيع للبائع والمشتري ولهما الخيار ثلاثة أيام فما دونها ولا يجوز أكثر من ذلك عند أبي حنيفة رحمه الله وقال أبو يوسف ومحمد رحمهما الله يجوز إذا سمى مدة معلومة

It shall be valid for the seller and the purchaser to stipulate an option (of cancellation) in a sale.[42] This option shall be for three days or less. An option for more than that (period of three days) shall not be valid according to Imām Abū Ḥanīfa.[43] According to Imām Abū Yūsuf and Imām Muḥammad it shall be valid as long as the period is clearly specified.

وخيار البائع يمنع خروج المبيع من ملكه فإن قبضه المشتري فهلك في يده ضمنه بالقيمة وخيار المشتري لا يمنع خروج المبيع من ملك البائع إلا أن المشتري لا يملكه عند أبي حنيفة رحمه الله وعندهما يملكه فإن هلك في يده هلك بالثمن وكذلك إن دخله عيب

If the seller has the option, the item of sale shall not leave his ownership. Thus, if the purchaser takes delivery of the item and it is destroyed in his possession he shall be liable for its value.[44] If the purchaser has the option,

[41] The 'option of stipulation' or the 'stipulated option' is known as such because it arises as a result of a stipulation within the sale contract that the purchaser or the seller has the option to cancel the contract within a specified period of time.

[42] This option may be included in the sale contract or maybe granted shortly thereafter.

[43] Imām Abū Ḥanīfa restricts this period to three days on the basis of the *ḥadīth* to that effect since stipulating such an option is, in principle, contrary to the binding nature of the contract of sale. However since it has been allowed based on the *ḥadīth* it will be restricted to the case defined in the source text.

[44] Since the item remained in the ownership of the seller and the destruction occurred in the purchaser's possession, the sale will fall away and the purchaser will

the item of sale shall leave the ownership of the seller but the purchaser shall not acquire ownership of the same according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad the purchaser shall acquire ownership of the item. Thus, if the item is destroyed in the purchaser's possession he shall be liable for the purchase price.[45] The same law shall apply if a defect comes into the item[46].

ومن شرط له الخيار فله أن يفسخ في مدة الخيار وله أن يجيزه فإن أجازه بغير حضرة صاحبه جاز وإن فسخ لم يجز إلا أن يكون الآخر حاضراً

The person for whom the option was stipulated may cancel the transaction within the option period or approve the transaction. If he approves the transaction in the absence of the other person it shall be valid.[47] If he cancels it shall not be valid unless the other person is present.[48]

وإذا مات من له الخيار بطل خياره ولم ينتقل إلى ورثته

In the event of the demise of the party that has the option, the option shall become void and shall not devolve to his heirs.[49]

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be liable for the market value (*qīma*) of the item instead of the purchase price agreed to between the parties.

[45] Since the item is now destroyed it is no longer possible for the purchaser to exercise his option of cancellation. The sale thus remains in effect and the purchase price is due and payable.

[46] If a permanent defect comes into the item when it is in the purchaser's possession he will no longer be able to exercise his option to cancel and will have to pay the purchase price.

[47] It is not necessary to notify the counterparty for the authorization to be valid.

[48] Cancellation will only be valid if the other party is notified of the same within the option period.

[49] The sale becomes binding upon the demise of the person in whose favour this option was stipulated because an option is deemed to be the mere exercising of choice - as opposed to an asset or right - and therefore cannot be passed on by way of succession.

ومن باع عبدا على أنه خباز أو كاتب فكان بخلاف ذلك فالمشتري بالخيار إن شاء أخذه بجميع الثمن وإن شاء ترك

If a person sells a slave with the stipulation that he is a baker or a scribe and he is (discovered to be) otherwise, the purchaser shall have the option of either retaining the slave for the full purchase price[50] or cancelling the sale.

[50] Should the purchaser decide to retain the slave he will be liable for the full purchase price, because the price of an item does not change if the item's description is not met. The purchaser, however, does have the option to cancel the transaction as the item does not meet the description specified in the contract. This is known as *khiyār al-waṣf.*

باب خيار الرؤية
Chapter: On Sight Option

ومن اشترى شيئا لم يره فالبيع جائز وله الخيار إذا رآه إن شاء أخذه وإن شاء رده

If a person purchases an item that he has not seen[51] the sale shall be valid.[52] Upon seeing the item he shall be granted the option of either taking it or returning it.[53]

ومن باع مالم يره فلا خيار له

If a person sells an item that he has not seen[54] he shall not have an option.[55]

ومن نظر إلى وجه الصبرة أو إلى ظاهر الثوب مطويا أو إلى وجه الجارية أو إلى وجه الدابة وكفلها فلا خيار له وإن رأى صحن الدار فلا خيار له وإن لم يشاهد بيوتها

If a person sees the top of a pile (of wheat), or the outer part of a folded garment, or the face of a slave-girl, or the face and rump of a riding animal

[51] E.g. A person purchases a garment that is within a box and he does not have sight of the garment at the time of the purchase.

[52] The ambiguity (*jahāla*), on account of the purchaser's having not seen the item, does not lead to dispute as the Sharīʿa grants the purchaser the option to cancel. The sale is therefore valid.

[53] After seeing the item the purchaser must exercise the option to either keep it for the agreed price or return it. The option to cancel will remain indefinitely until he makes this decision or there is indication of his intention to keep the item e.g. he offers the item for sale.

[54] E.g. A person sells an item that he inherited without having had sight of the item at the time of concluding the sale.

[55] The option to cancel a sale contract on account of not having seen the item of sale only applies to the purchaser as mentioned in the *ḥadīth*. This option is not granted to the seller.

he shall not be granted an option.[56] If he sees the courtyard of a house he shall not be granted an option even though he did not see the rooms.[57]

وبيع الأعمى وشراؤه جائز وله الخيار إذا اشترى ويسقط خياره بأن يجس المبيع إذا كان يعرف بالجس أو يشمه إذا كان يعرف بالشم أو يذوقه إذا كان يعرف بالذوق ولا يسقط خياره في العقار حتى يوصف له

The sale and purchase concluded by a blind person shall be valid. When he purchases he shall be granted the option (to cancel.) This option shall lapse upon his touching the item of sale, if it can be known through touch, or his smelling it, if it can be known through smell, or his tasting it, if it can be known through taste. In (the purchase of) property his option shall only lapse when the property is described to him.[58]

[56] The purpose of granting the purchaser the on sight option is to ensure that his consent for the transaction is attained after his having acquired sufficient information regarding the item of sale. It is not necessary for the purchaser to see the entire item of sale in order to gain knowledge of it. Seeing part of the item of sale can also suffice if knowledge of the main purpose of the item is attained.

[57] The view of Imām Zufar, a student of Imām Abū Ḥanīfa, as well as later scholars of the Ḥanafī School of Islamic jurisprudence is that this applied only in the era of the earlier Ḥanafī scholars since the practice in those days was to build rooms within houses in an identical manner. In the time of later scholars (like nowadays) this is most certainly not the case, and thus the purchaser will be granted the option to cancel the sale upon seeing the rooms within the house if he had not seen them prior to that. (*Al-Hidāya*)

[58] Knowledge of the item of sale, in some instances takes place in ways other than sight. Thus, the appropriate manner of gaining knowledge of the item will apply for different items for both a seeing and a blind person. However where sight is required for knowledge this will need to be replaced by description in the case of a blind person.

ومن باع ملك غيره بغير أمره فالمالك بالخيار إن شاء أجاز البيع وإن شاء فسخ وله الإجازة إذا كان المعقود عليه باقياً والمتعاقدان بحالهما

If a person sells someone else's item without his permission[59] the owner shall have the option of either approving or cancelling the sale. The right to approve the sale shall only apply if the subject matter of the sale is in existence and the status of the contracting parties has not changed.[60]

ومن رأى أحد ثوبين فاشتراهما ثم رأى الآخر جاز له أن يردهما

If a person sees (only) one of two garments and then purchases them both, he shall be allowed to return both the garments upon seeing the second one.[61]

ومن مات وله خيار الرؤية بطل خياره

If a person passes away whilst having the on sight option, his option shall become void.[62]

[59] Such a person is termed a *fuḍūlī*.

[60] If the subject matter of the sale was destroyed or one of the contracting parties has passed away it will not be possible to ratify the sale.

[61] Since the sale took place for two garments that are different from each other, the sight of one does not give the purchaser sufficient knowledge of the full subject matter of the sale. He therefore retains the option to cancel. If he decides to cancel upon seeing the second garment, he will not be allowed to return only one garment as this will lead to *tafrīq al-ṣafqa* (i.e. the seller's being compelled to split the transaction) before the sale was complete.

[62] As in the case of *khiyār al-sharṭ* (the option of stipulation) discussed in the previous chapter, *khiyār al-ruʾya* (the on sight option) also becomes void upon demise and does not devolve upon the heirs.

ومن رأى شيئا ثم اشتراه بعد مدة فإن كان على الصفة التي رآه فلا خيار له
وإن وجده متغيرا فله الخيار

If a person sees an item and thereafter purchases it after a period of time[63], he shall not be granted an option if the description of the item has not changed. If he finds that (the description of) the item has changed he shall be granted an option.

[63] i.e. knowing that he had seen it previously.

باب خيار العيب
Chapter: Option of Defect

إذا اطلع المشتري على عيب في المبيع فهو بالخيار إن شاء أخذه بجميع الثمن وإن شاء رده وليس له أن يمسكه ويأخذ النقصان

If the purchaser discovers a defect[64] in the item of sale he shall have the option of either of keeping the item for the full (agreed) purchase price or returning it.[65] He shall not have the right to retain the item and claim damages.[66]

وكل ما أوجب نقصان الثمن في عادة التجار فهو عيب

Anything that results in a reduction in the price (of the item) as per common trade practice shall be considered a defect.[67]

[64] This refers to a defect that was in the item prior to the sale and which the purchaser was not aware of at the time of the sale.

[65] He is granted the option of returning the item because a sale without qualification demands by default that the item of sale be free of defect.

[66] The absence of the 'free from defect' attribute in the item of sale, although a requirement of an unqualified sale, will not result in a reduction in the sale price since the price of an item does not change if the item's description is not met.

[67] Anything that causes a decrease in the worth or value of an item is deemed a defect. This decrease is denoted by a reduction in the price of the item in normal trade practice.

والإباق والبول في الفراش والسرقة عيب في الصغير ما لم يبلغ فإذا بلغ فليس ذلك بعيب حتى يعاوده بعد البلوغ

Running away, urinating in the bed and stealing shall be (deemed) defects in a minor slave until maturity. When he becomes mature these shall no longer be (deemed) defects unless they recur after maturity.[68]

والبخر والدفر عيب في الجارية وليس بعيب في الغلام إلا أن يكون من داء

An offensive odour emanating from the mouth or armpits are (deemed) defects in a slave-girl[69] but are not (deemed) defects in a male slave unless it is on account of an ailment.

والزنا وولد الزنا عيب في الجارية دون الغلام

(Commission of) *zinā* (fornication) and (being) a child of *zinā* are (deemed) defects in a slave-girl but not in a male slave.[70]

[68] Since the underlying cause for these defects differs in a minor and an adult they are regarded to be different defects. Thus the defect has to be found both by the seller and purchaser at the same stage i.e. as a minor or after maturity.

[69] The presence of such an offensive odour in a slave-girl may have an impact on one of the purchaser's objectives for acquiring her viz. sexual intercourse. This does not apply in the case of a male slave, whose main function is to work and serve the master. However, if the odour is caused by an underlying ailment or is excessively offensive it will be deemed a defect in a male slave as well.

[70] The existence of such defects impacts on one of the main objectives of acquiring a slave-girl viz. to procreate. Generally, a man would not approve of the mother of his child being an unchaste woman. Likewise a woman who is herself a child of fornication is generally not regarded as suitable to be a mother as this will tarnish the child's reputation. The commission of *zinā* shall also be deemed a defect in a male slave if it occurs so frequently that it impacts on the master's taking service from him.

وإذا حدث عند المشتري عيب ثم اطلع على عيب كان عند البائع فله أن يرجع بنقصان العيب ولا يرد المبيع إلا أن يرضى البائع أن يأخذه بعيبه

If a new defect occurs (in the item of sale) whilst it is in the possession of the purchaser, and thereafter the purchaser discovers a defect that was there whilst (it was) in the possession of the seller, the purchaser may claim compensation for the defect (from the seller). He shall not (have the right to) return the item except if the seller consents to taking it (back) with the (new) fault.[71]

وإن قطع المشتري الثوب فوجد به عيبا رجع بالعيب

If the purchaser cuts the cloth (purchased) and thereafter finds a defect in it he may claim compensation for the defect.[72]

وإن خاطه أو صبغه أو لتّ السويق بسمن ثم اطلع على عيب رجع بنقصانه وليس للبائع أن يأخذه

If the purchaser sews the cloth (into a garment), or dyes it, or mixes the crushed wheat[73] (that he purchases) with ghee and thereafter discovers a defect he may claim compensation. The seller shall not have the option of taking the item (back).[74]

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[71] The granting of the 'option of defect' to the purchaser is in order to protect his interests. However in this case, returning the item, whilst protecting the interests of the purchaser, will prejudice the seller due to there being a new defect in the item. The only equitable solution is for the purchaser to claim compensation from the seller. This compensation will be equivalent to the proportionate reduction of the sale price based on the difference between the market value of the item with the original defect and the market value of the item without the original defect.

[72] Since the cloth has been cut up by the purchaser this is deemed a new defect and he therefore will not have the right to return it to the seller unless the seller is willing to forego his right and accept it in that condition.

[73] *Sawīq* is a type of food made from crushed wheat or barley.

[74] After the cloth is sewn into a garment or the ghee (clarified butter) is mixed with the wheat the item now has added value. It is not possible to cancel the sale and

ومن اشترى عبدا فأعتقه أو مات ثم اطلع على عيب رجع بنقصانه
فإن قتل المشتري العبد أو كان طعاما فأكله لم يرجع عليه بشيء في قول أبي حنيفة
وقال أبو يوسف ومحمد يرجع

If a person purchases a slave and sets him free or the slave dies, and he then discovers a defect (in the slave) he may claim compensation.[75] If the purchaser kills the slave or consumes the item of food purchased he may not claim any compensation according to the view of Imām Abū Ḥanīfa.[76] Imām Abū Yūsuf and Imām Muḥammad are of the view that he may claim compensation.[77]

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return the item without this value-add, and the seller cannot take the item back with the value-add as he will be receiving more than he what he had given.

[75] If the slave dies or is set free he obviously cannot be returned to the seller as he is no longer considered to be *māl* i.e. an item of value. The purchaser is therefore allowed to claim compensation from the seller since the death was not caused by his action. In the case where he set the slave free this is the action of the purchaser and therefore should logically preclude him from claiming any compensation. However the jurists have reasoned, on the basis of *Istiḥsān*, that freedom in a human being is the outward manifestation of the completion of the temporary state of slavery representing his return to the original state of freedom. It is therefore deemed to be outside the scope of the purchaser's volition and does not preclude him from claiming compensation.

[76] Killing the slave and consuming the food purchased are deliberate acts done by the purchaser and he is therefore held liable for them. The purchaser in such instance is the cause for the impossibility of returning the item of sale to the seller and is therefore precluded from claiming compensation from him.

[77] Since consuming the item is the normal acceptable action by a purchaser of food, the two Imāms hold the view that the purchaser cannot be prejudiced on the basis of such action.

ومن باع عبدا فباعه المشتري ثم رد عليه بعيب فإن قبله بقضاء القاضي فله أن يرده على بائعه وإن قبله بغير قضاء القاضي فليس له أن يرده

If a person sells a slave to a purchaser who resells him and thereafter the slave is returned to him (i.e. the first purchaser) due to a defect (the following applies): If he accepts the slave (back) on the basis of a court order he shall have the right to return him to his seller. If he accepts the slave back without a court order he shall not have the right to return him.[78]

ومن اشترى عبدا وشرط البراءة من كل عيب فليس له أن يرده بعيب وإن لم يسم العيوب ولم يعدها

If a person purchases a slave and stipulates freedom (of liability) from every defect, he may not return the slave on the basis of any defect, even though he did not mention and enumerate all the defects (in the item).[79]

[78] When a *Qāḍī* (Islamic judge) issues a court order for the return of the item of sale it is deemed a cancellation of the sale and applies to all subjects that fall under the jurisdiction of the court. In other words it is as if the sale did not take place at all. However if the item is taken back by the seller without a court order the cancellation applies only to the contracting parties and does not apply to any third party. The original seller in this instance is deemed a third party to the second sale transaction and therefore the item cannot be returned to him.

[79] The purchaser in essence agrees to waive his right to the option of defect and absolves the seller of any liability in this regard. It is not necessary for the seller or the purchaser to be aware of the defects in the item and the waiver will apply to all patent and latent defects. A similar (although not identical) concept exists in South African law known as the 'voetstoots clause.' Nevertheless it is the moral duty of the seller to inform the purchaser of any latent defects in the item and it is not permissible for him to knowingly conceal such information.

باب البيع الفاسد
Chapter: The Fāsid[80] (Void) Sale

إذا كان أحد العوضين أو كلاهما محرما فالبيع فاسد كالبيع بالميتة أو بالدم أو بالخمر أو بالخنزير وكذلك إذا كان غير مملوك كالحر

If one of the items of exchange (in a sale) or both of them are prohibited (in Sharīʿa) the sale shall be (deemed) *fāsid*.[81] e.g. the sale (of an item) in exchange of carrion[82], blood, wine or swine.[83] Likewise, if it (i.e. one of the items of exchange) is not owned e.g. a freeman.[84]

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[80] The term *fāsid* (literally corrupt or invalid) as used by Imām Al-Qudūrī in this chapter broadly includes the technically *bāṭil* (*void ab initio* or totally void) as well as the technically *fāsid* (voidable) sale. The distinction between the two is that in the first type (viz. the *bāṭil*) the sale is essentially void and is of no consequence, whereas in the second type (viz. the *fāsid*) the sale still produces its effect of transfer of ownership after possession takes place.

[81] Refer to the broad usage of the term *fāsid* discussed in the previous footnote.

[82] Carrion refers to an animal that dies naturally or is killed in any manner not approved by Sharīʿa.

[83] The prohibition of these four items (carrion, blood, wine and swine) is clearly evident from other sources. The sale of these items or the sale of any item in exchange for these items will therefore be invalid. In the case of the first two (viz. carrion and blood) the sale of them or the sale of any item in exchange for them will be *bāṭil* as they are not considered to be *māl* (i.e. an item of value or wealth) at all. The basic definition of sale (exchange of wealth for wealth) is therefore not found.
With regards to wine and swine, when they are the object of sale (*mabīʿ*)the sale will be *bāṭil* as this entails reverence of these items being the subject matter of the sale transaction. This is in direct contravention of the Sharīʿa requirement to dishonour them. However, the sale of an item in exchange for wine or swine will be technically *fāsid* (and not *bāṭil*) since these items are regarded as *māl* in relation to some persons (e.g. the *ahl al-dhimma* living in Muslim lands.) In such case they, being the purchase price (*thaman*) rather than the object of sale (*mabīʿ*), are not

وبيع أم الولد والمدبر والمكاتب فاسد

The sale of an *umm al-walad*[85], *mudabbar*[86] and *mukātab*[87] slave shall be *fāsid*.[88]

ولا يجوز بيع السمك في الماء ولا بيع الطير في الهواء

The sale of a fish in the water or a bird in the sky shall not be valid.[89]

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given specific reverence as they are simply a means of procuring the item in exchange which is the actual subject matter of the sale.

[84] A free person is not considered to be an item of value (*māl*) and cannot be bought or sold.

[85] *Umm al-walad* refers to a female slave that gives birth to her master's child.

[86] *Mudabbar* refers to a slave to whom the master promised freedom upon his (the master's) death.

[87] *Mukātab* refers to a slave who has entered into a contract of *mukātaba* or *kitāba* (manumission) with the master in terms of which the slave is required to pay a certain sum of money during a specific time period in exchange for his freedom.
The institution of *mukātaba* is based on Qurʾān 24:33: "*If any of your slaves wish to pay for their freedom, make a contract with them accordingly, if you know they have good in them, and give them some of the wealth God has given you*."
Although the owner is not obliged to comply with the request, it is considered *mustaḥabb* (praiseworthy) for him to do so.

[88] The sale of these types of slaves is void (*bāṭil*) as the transfer of ownership, by means of a sale contract, is in conflict with their status i.e. being entitled to freedom upon the death of the master in the case of the first two, or upon payment of the agreed sum in the case of the *mukātab*.

[89] Fish in the water and birds in the sky are not owned by anyone. The sale of such *mubāḥ* items will therefore be deemed as the sale of something not owned by the seller, which will be void. After the fish or bird is caught it enters into the ownership of the one who catches it and thereafter it may be sold. However if it is released again and is no longer within the capacity of the seller to capture and hand over to the purchaser, it may not be sold due to the inability of the seller to deliver the item of sale.

ولا يجوز بيع الحمل ولا النتاج

The sale of the foetus (of an animal) or the foetus of the foetus shall not be valid.[90]

ولا بيع اللبن في الضرع والصوف على ظهر الغنم

The sale of milk in the udder[91] (of an animal) or wool on the back of the sheep shall not be valid.[92]

وذراع من ثوب وجذع في سقف وضربة القانص

(The sale of) one cubit of a garment or a beam in a ceiling[93] and the throwing (of the net) of the hunter[94] (shall not be valid.)

[90] These types of sale have been prohibited in the ḥadīth based on the element of *gharar* (i.e. uncertainty of the outcome) contained in them. It is uncertain whether the foetus exists or if it will be born alive, or whether it will reach an age to bear offspring.

[91] There is an element of uncertainty (*gharar*) as to whether there is actually milk in the udder or not. In addition there is the strong likelihood of a dispute arising between the purchaser and the seller regarding the method of milking. There is also the possibility of more milk being produced by the animal subsequent to the sale and prior to delivery resulting in the impossibility of distinguishing the milk sold from the milk that was produced later. Such a sale is therefore deemed invalid.

[92] Due to the strong likelihood of a dispute arising between the purchaser and seller regarding the depth of shearing this sale is not valid.

[93] The sale of one cubit of a garment or one beam of a ceiling is not valid, even if it is specified, as the seller is not able to hand over the item to the purchaser without suffering additional damage by having to cut the garment or remove the ceiling beam.

[94] Such a sale is not valid as there is uncertainty with regards to whether any animal will be caught in that net or not and what animal is being sold. In addition the hunter is not the owner of the animal at the time of the conclusion of the sale transaction.

وبيع المزابنة وهو بيع الثمر على رؤوس النخل بخرصه تمرا

The *muzābana* sale shall not be valid. This refers to the sale of fruit (dates) on the date palm in exchange for an estimated quantity of (loose) dates.[95]

ولا يجوز البيع بإلقاء الحجر والملامسة

The sale by 'throwing of a stone' or by 'mutual touch' shall not be valid.[96]

ولا يجوز بيع ثوب من ثوبين

The sale of one garment out of two shall not be valid.[97]

ومن باع عبدا على أن يعتقه المشتري أو يدبره أو يكاتبه أو باع أمة على أن يستولدها فالبيع فاسد وكذلك لو باع عبدا على أن يستخدمه البائع شهرا أو دارا على أن يسكنها أو على أن يقرضه المشتري درهما أو على أن يهدي له هدية

If a person sells a slave subject to the condition that the purchaser will free him, make him a *mudabbar* or a *mukātab*, or (if he) sells a slave-girl subject to

[95] The sale of dates in exchange for dates is only valid if the quantity in both exchanges is equal. Any excess on one side renders the sale invalid on the basis of the prohibition of *ribā al-faḍl* as contained in the ḥadīth. When the dates are still on the date palm it is not possible to measure them and therefore we cannot positively determine that the quantity in both exchanges is equal. This results in the strong possibility of *ribā al-faḍl*.

[96] The ḥadīth has prohibited these types of sales which were common during the *jāhiliyya* (pre-Islamic) period. It involved a sale transaction which became binding once a stone was thrown onto the item or once the item was touched, without any regard for the willing consent of the bargaining parties to conclude the transaction.

[97] The sale of one unspecified garment out of two is not valid as the object of sale is ambiguous (*majhūl*). If the contracting parties agree to grant the purchaser the option of choosing any one of the two garments subsequent to the sale within a specified period, the transaction shall be allowed on the basis of juristic equity (*istiḥsān*.) This option is termed *khiyār al-taʿyīn* i.e. the option of specification.

the condition that the purchaser will seek to have a child from her, the sale shall be invalid.[98] The same shall apply if he sells a slave subject to the condition that the seller will take service from him for a month or (he sells) a property subject to the condition that the seller will reside in it (for a month) or subject to the condition that the purchaser will lend him one dirham or grant him a gift.[99]

ومن باع عينا على أن لا يسلمها إلى رأس الشهر فالبيع فاسد

ومن باع جارية إلا حملها فسد البيع

If a person sells an article subject to the condition that that the seller will only hand it over after a month, the sale shall be invalid.[100] If a person sells a slave-girl excluding her unborn child, the sale shall be invalid.[101]

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[98] A sale will be invalid if it contains a stipulation that is in conflict with the general requirements of the contract of sale and which produces some benefit for one of the contracting parties or the object of sale (e.g. if the object of sale is a slave). The Prophet ﷺ prohibited a sale with (such) a stipulation. Since the additional benefit is not in consideration for any exchange it therefore falls under the definition of *ribā.* In addition it has the potential of leading to a dispute. If the stipulation produces no benefit for anyone it shall not invalidate the contract. Stipulations that are accepted in customary practice are also allowed.

In the examples cited in the text, the benefit of the stipulation is for the object of sale itself i.e. the slave benefits by becoming free or entitled to freedom.

[99] In these instances the stipulation produces express benefit for the seller and therefore renders the sale invalid.

[100] Deferment of a specified item of sale is not valid because there is no need for this as the item is already in existence and available. The sale should be concluded immediately and may not be concluded now for delivery at a later date. If the seller has a need for the item he may retain the item and conclude the sale at a later date. In addition such a stipulation negates delivery which is warranted by the contract. Thus, in principle, a forward contract or a futures contract is not valid in Sharīʿa unless it satisfies the requirements of Salam, in which case it will be valid as an exception to the rule as will be discussed later.

[101] Anything that cannot be sold individually cannot be excluded from a sale e.g. the unborn child of a slave-girl. Including such an exclusion clause in the sale contract is akin to the inclusion of an invalidating stipulation and will render the sale invalid.

ومن اشترى ثوباً على أن يقطعه البائع ويخيطه قميصاً أو قباءً أو نعلاً على أن يحذوها أو يشركها فالبيع فاسد

If a person purchases cloth subject to the condition that the seller cuts it and sews it into a shirt or cloak, or (purchases) a shoe (leather[102]) subject to the condition that the seller makes it into a shoe or fixes straps to it, the sale shall be invalid.[103]

والبيع إلى النيروز والمهرجان وصوم النصارى وفطر اليهود إذا لم يعرف المتبايعان ذلك فاسد ولا يجوز البيع إلى الحصاد والدياس والقطاف وقدوم الحاج فإن تراضيا بإسقاط الأجل قبل أن يأخذ الناس في الحصاد والدياس وقبل قدوم الحاج جاز البيع

A sale (with deferment of payment) until *Nayrūz*, *Mahrajān*[104], the Christian fast or the end of the Jewish fast, of which the two contracting parties are unaware, shall be invalid.[105] A sale (with deferment of payment) until the harvest, threshing or plucking or the return of the pilgrims (*Hājjīs*) shall not be valid.[106] If the contracting parties agree to waive the deferment prior to

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[102] The word *naʿl* (lit. shoe) here refers to a piece of leather that is going to be made into a shoe.

[103] Such a stipulation, in principle, invalidates the sale as it is a stipulation that is in conflict with the general requirements of the contract of sale and contains benefit for one of the contracting parties. In addition it becomes two transactions in one which the Prophet ﷺ has prohibited in the ḥadīth. However, scholars have allowed sales with such stipulations on the basis of juristic equity (*istiḥsān*) based on *taʿāmul* (accepted customary practice) since in practice such transactions rarely gave rise to dispute.

[104] *Nayrūz* and *Mahrajān* were two festivals in the ancient Persian calendar that were held in the beginning of spring and in the beginning of autumn respectively.

[105] Such sales are invalid on account of the potential for dispute due to the ambiguity with regards to the payment date. If the payment date is clear to the contracting parties the sale shall be valid.

[106] The date of the occurrence of these events is not certain and hence the sale is rendered invalid.

the commencement of the harvest or threshing, or prior to the arrival of the pilgrims, the sale shall be valid.[107]

وإذا قبض المشتري المبيع في البيع الفاسد بأمر البائع وفي العقد عوضان
كل واحد منهما مال ملك المبيع ولزمته قيمته

When the purchaser in an invalid sale contract, in which both exchanges are items of value, takes possession of the object of sale, with the permission of the seller, he shall acquire ownership of the item of sale[108] and shall be liable for its (market) value.[109]

ولكل واحد من المتعاقدين فسخه فإن باعه المشتري نفذ بيعه

Each one of the two contracting parties shall have the right to cancel the transaction.[110] If the purchaser sells the item the sale shall go through.[111]

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[107] It is possible for the contracting parties to rectify the sale by waiving the deferment prior to the occurrence of these events, in which case the sale shall become valid and payment shall be due immediately.

[108] Ownership in an invalid (*fāsid*) sale transaction passes from seller to purchaser when supported by possession or delivery (i.e. *qabḍ.*) Prior to delivery, ownership in an invalid (*fāsid*) sale does not pass. In a void (*bāṭil*) sale transaction ownership does not pass under any circumstance.

[109] Since the sale was invalid it must be cancelled and the item must be returned. If this is not possible due to the item's being destroyed or due to any other reason, the purchaser shall be liable for the market value (*qīma*) of the item, as opposed to the purchase price (*thaman*) specified in the sale. In the case of fungibles (*mithliyyāt*) the equivalent quantity of a similar item must be given.

[110] Since the sale is in contravention of the Sharīʿa (Islamic law) the parties are legally obliged to cancel the sale. The legal right to cancel the transaction will be given to each one of the two contracting parties, without the order of a judge, if the cause of the invalidity was within the core of the contract (e.g. in the items of exchange themselves.) If the invalidity was due to an unwarranted additional clause the party in whose favour the clause is will have the right to cancel.

[111] Since the purchaser becomes the legal owner of the item after delivery, the onward sale will give rise to its legal consequence and cancellation of the first sale will not be possible. However such action of the purchaser is contrary to the *Sharīʿa*

ومن جمع بين حر وعبد أو شاة ذكية وميتة بطل البيع فيهما ومن جمع بين عبد ومدبر أو عبده وعبد غيره صح العقد في العبد بحصته من الثمن

If a person combines a freeman with a slave or a slaughtered sheep with a dead sheep (in one transaction) the sale shall be void in both items. If a person combines a slave with a *mudabbar* (slave) or his slave with the slave of another person the sale shall be valid in the slave for his portion of the (purchase) price.[112]

ونهى رسول الله صلى الله عليه وسلم عن النجش وعن السوم على سوم غيره وعن تلقي الجلب وعن بيع الحاضر للبادي وعن البيع عند أذان الجمعة وكل ذلك يكره ولا يفسد به العقد

The Prophet ﷺ prohibited *najash*[113] , bargaining over someone else's deal,[114] meeting the caravan,[115] the sale of a city dweller for a Bedouin[116]and the sale

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and any profit made on such transaction will be tainted and must be necessarily disposed of to charity.

[112] The joint sale of an item that cannot legally be an object of sale with a legal object of sale will render the sale of both items void. However if the item so combined can, in some instances, be a legal object of sale, the sale shall be valid in the item combined with it but not in the illegal item. E.g. the sale of somebody else's slave with the permission of the owner and the sale of a *mudabbar* slave by decree of the court is valid. They are therefore items that can be legal objects of sale in some instances. Hence, if another item is combined with one of these items in a single sale transaction, the sale in that other item shall be valid but the sale of the slave belonging to the third person and the *mudabbar* is not valid. This is in contrast to the case of combination of a freeman and a slave, in which instance the sale is void in both items.

[113] *Najash* refers to the practice of bidding for an item without the intention of actually purchasing it but with the intention of deceiving the purchaser and raising the selling price of the item.

[114] If a deal between a purchaser and seller is about to be concluded with the mutual consent of both parties it is prohibited for a third person to intervene and bid for the item. The same prohibition applies in the case of a marriage proposal. Such interference causes ill-feelings and has therefore been prohibited. It must be noted

at the time of the call to the Friday prayer.[117] All these sales shall be disliked (*makrūh*) but the contract shall not be invalid.[118]

ومن ملك مملوكين صغيرين أحدهما ذو رحم محرم من الآخر لم يفرق بينهما وكذلك إن كان أحدهما كبيراً والآخر صغيراً فإن فرق بينهما كره له ذلك وجاز البيع وإن كانا كبيرين فلا بأس بالتفريق بينهما

If a person becomes the owner of two minor slaves, that are close *maḥram*[119] relatives of each other, he shall not be allowed to separate[120] them. The same law applies if one of them is an adult and the other is a minor. If he separates them this shall be disliked (*makrūh*) but the sale shall be valid. If both of them are adults there shall be no harm in separating them.

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that this prohibition does not apply in the case of an auction, in which the goods are offered by the seller himself for bids and then sold to the highest bidder. The auction sale has been allowed in the ḥadīth.

[115] Going out to meet a caravan that is bringing goods into the city has been prohibited because doing so may harm the inhabitants of the city by monopolization of the goods purchased from the importers. In addition the importers may be deceived as to the market value of the goods in the city.

[116] A city dweller's interference in the sale of a visiting Bedouin causes harm to the inhabitants of the city by his delaying the sale of goods required by them for a long period in anticipation of an increase in the demand and the price i.e. by speculating.

[117] The Qurʾān (62:9) explicitly prohibits this as it interferes with the obligation of hastening towards the remembrance of Allah in the form of the Friday sermon and prayer: *"O Believers! When the call to prayer is made on the day of congregation (Jumuʿa), hurry towards the reminder of Allah and leave your trading–that is better for you, if only you knew."* The prohibition applies to those required to attend the Jumuʿa prayer from the time the first *adhān* (call to prayer) is given.

[118] Notwithstanding the fact that these sales have been prohibited and the perpetrator is guilty of sin, the sale shall be legally valid and the purchase price (*thaman*) shall become due.

[119] *Maḥram* refers to a person to whom one cannot ever be legally married.

[120] i.e. by selling or gifting one of them. The Prophet ﷺ has prohibited this in the ḥadith.

باب الإقالة
Chapter: Cancellation

الإقالة جائزة في البيع بمثل الثمن الأول فإن شرط أقل منه أو أكثر فالشرط باطل ويرد مثل الثمن الأول

Cancellation (of a sale) shall be valid[121] for the equivalent of the initial price. If less or more (than the initial price) is stipulated (in the cancellation) such a clause shall be void and the equivalent of the initial price shall be returned.[122]

وهي فسخ في حق المتعاقدين بيع جديد في حق غيرهما في قول أبي حنيفة

Cancellation shall be (deemed) an annulment (*faskh*)[123] with respect to the two contracting parties and a new sale transaction[124] with respect to third parties, according to Imām Abū Ḥanīfa.

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[121] Cancellation of a transaction by the mutual consent of the two contracting parties is legally valid. The ḥadīth encourages a Muslim businessman to carry out such cancellations. The Prophet ﷺ said: "Whoever cancels the transaction of his Muslim brother, Allah will cancel his faults on the day of rising."

[122] According to Imām Abū Ḥanīfa, a cancellation can only be valid for the original price. Any stipulation otherwise will be void but will not affect the validity of the cancellation.

[123] If words denoting cancellation are used the transaction shall be deemed an annulment of the original contract. If words denoting a sale are used the transaction shall be deemed a sale.

[124] Since the authority of the two contracting parties is limited to themselves, the cancellation transaction is only deemed an annulment with respect to themselves. With regards to third parties, the cancellation is viewed as the 'exchange of an item of value for another item of value with mutual consent' and is therefore deemed a sale transaction and entitles them to any rights arising from such transaction e.g. the right of *shufʿa* (pre-emption.)

وهلاك الثمن لا يمنع صحة الإقالة وهلاك المبيع يمنع منها
فإن هلك بعض المبيع جازت الإقالة في باقيه

Destruction of the price[125] shall not prevent the validity of the cancellation. However, destruction of the object of sale shall prevent the same.[126] If part of the object of sale is destroyed, cancellation shall be valid in the remaining part.

[125] i.e. the initial amount paid in the original sale.

[126] A sale can only be cancelled as long as it exists. The existence of a sale is based on the existence of the object of sale (i.e. the *mabīʿ*.) The price (*thaman*) is merely a medium of exchange and is not the object of the sale transaction.

باب المرابحة والتولية
Chapter: *Murābaḥa* (Cost-Plus Sale) and *Tawliya* (Cost Sale)

المرابحة نقل ما ملكه بالعقد الأول بالثمن الأول مع زيادة ربح
والتولية نقل ما ملكه بالعقد الأول بالثمن الأول من غير زيادة ربح

Murābaḥa is the transfer of what was acquired by means of the initial contract in exchange for the initial price together with an addition of profit. *Tawliya* is the transfer of what was acquired by means of the initial contract in exchange for the initial price without any addition of profit.[127]

ولا تصح المرابحة ولا التولية حتى يكون العوض مما له مثل

Murābaḥa and *tawliya* shall not be valid unless the exchange is something that has an equivalent.[128]

[127] In *murābaḥa* and *tawliya* the initial price (i.e. cost price) of the item is explicitly stated or recorded in the contract. These contracts are based on trust and reliance on the honesty of the seller and fall under the category of sales termed *buyūʿ al-amāna* (trust sales.) Should any dishonesty be discovered on the part of the seller with regards to the proper disclosure of the cost of the item of sale, this will give rise to certain legal rights in favour of the purchaser. A third type of sale in this category is the *waḍīʿa* sale in which the item of sale is sold for less than the cost price.

[128] Since the price in the second sale is based on the price in the first sale, the exchange (i.e. the *thaman*) in the first sale must be a *mithlī* (fungible) item that has an equivalent. If it is not a fungible item the price in the second sale will have to be based on its value (*qīma*) and because this value is unknown the contract will not be valid.

ويجوز أن يضيف إلى رأس المال أجرة القصار والصباغ والطراز والفتل وأجرة حمل الطعام ولكن يقول قام علي بكذا ولا يقول اشتريته بكذا

It shall be valid to add to the principal amount (i.e. the original price) the fee of the bleacher, dyer, embroidery or hemming and the fee for transporting the grain.[129] In such instances the seller shall state, 'My landed cost was such (amount)' instead of saying, 'I bought it for so much.'

فإن اطلع المشتري على خيانة في المرابحة فهو بالخيار عند أبي حنيفة إن شاء أخذه بجميع الثمن وإن شاء رده وإن اطلع على خيانة في التولية أسقطها المشتري من الثمن وقال أبو يوسف يحط فيهما وقال محمد لا يحط فيهما

If the purchaser discovers dishonesty (on the part of the seller) in a *murābaḥa* transaction he shall have the option,[130] according to Imām Abū Ḥanīfa, of either taking the item for the full price specified or returning the item. If he discovers dishonesty in a *tawliya* transaction he may reduce the price accordingly. Imām Abū Yūsuf is of the view that reduction (of the price) may be applied in both cases (i.e. *murābaḥa* and *tawliya*). Imām Muḥammad does not permit reduction in either case.[131]

[129] Any expense that adds value to the item of sale by increasing the actual item itself or by increasing its market value may be included as part of the cost of the item without the need for explicitly mentioning these expenses to the purchaser.

[130] As stated previously the contracts of *murābaḥa* and *tawliya* are based on reliance on the honesty of the seller and any dishonesty on the part of the seller gives rise to certain legal rights in favour of the purchaser. The Imāms of the Ḥanafī School of jurisprudence, however, differ with regard to whether this gives the purchaser the right to cancel the contract or to reduce the price in proportion to the extent of the dishonesty as described by Imām al-Qudūrī in the text.

[131] Imām Muḥammad does, however, grant the option to the purchaser to cancel the transaction.

ومن اشترى شيئا مما ينقل ويحول لم يجز له بيعه حتى يقبضه ويجوز بيع العقار قبل القبض عند أبي حنيفة وأبي يوسف وقال محمد لا يجوز

If a person purchases an item that is movable he may not sell it until he takes possession of the same.[132] The sale of immovable property prior to possession shall be valid according to Imām Abū Ḥanīfa and Imām Abū Yūsuf but not according to Imām Muḥammad.[133]

ومن اشترى مكيلا مكايلة أو موزونا موازنة فاكتاله أو اتزنه ثم باعه مكايلة أو موازنة لم يجز للمشتري منه أن يبيعه ولا يأكله حتى يعيد الكيل والوزن

If a person purchases an item by measure of volume or by measure of weight and after measuring or weighing the same sells it by measure of volume or weight, the second purchaser may not sell nor consume the item until he repeats the measuring and weighing.[134]

والتصرف في الثمن قبل القبض جائز

Transacting in the price before taking possession shall be valid.[135]

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[132] The Prophet ﷺ prohibited the sale of an item that possession has not been taken of. The raison d'être for the prohibition relates to the uncertainty (*gharar*) of the contract falling through in the event of the seller's not receiving the item due to its destruction or due to any other reason.

[133] Since the possibility of destruction in the case of immoveable property is remote, Imām Abū Ḥanīfa and Imām Abū Yūsuf are of the view that this does not fall under the prohibition contained in the ḥadīth.

[134] Since the item was sold by a specific measure of weight or volume, any excess shall not belong to the purchaser. He is therefore required to ensure that the quantity he receives is as per the terms of the sale and that any excess must be returned to the seller. To do this he has to measure the item before he consumes or on-sells it.

[135] The purchase price (i.e. the amount due in exchange for the item of sale in the form of dirhams, dīnārs or any other measurable item) does not become specific in a sale transaction. There is, therefore, no uncertainty (*gharar*) of the contract falling

ويجوز للمشتري أن يزيد البائع في الثمن ويجوز للبائع أن يزيد في المبيع
ويجوز أن يحط من الثمن ويتعلق الاستحقاق بجميع ذلك

The purchaser may increase the agreed purchase price (payable) to the seller. (Likewise) the seller may increase the item of sale. He may (also) discount the purchase price. Entitlement shall be linked to all of the above.[136]

ومن باع بثمن حال ثم أجله أجلا معلوما صار مؤجلا
وكل دين حال إذا أجله صاحبه صار مؤجلاً إلا القرض فإن تأجيله لا يصح

If a person sells (an item) for a cash price and thereafter defers it for a known period it shall become deferred. Any debt[137] that is due and payable shall become deferred if deferred by the creditor[138] except a loan, the deferment of which shall not be valid.[139]

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through on account of destruction of the same as it may simply be replaced with an equivalent quantity of the same item.

[136] Once the contracting parties agree to an increase or decrease in the purchase price or in the item of sale, this will become a binding term of the contract and any entitlement (e.g. payment, delivery etc.) will be based on the newly agreed terms.

[137] Debt refers to an amount of money that is payable as a result of a transaction (e.g. the purchase price payable in a sale) or other act (e.g. compensation for a damaged item.)

[138] Since a debt is the sole right of the creditor he is entitled to waive it permanently or for a defined period (deferment.)

[139] A loan (*qarḍ*) cannot be deferred due to its being, at inception, a contract of benevolence. Such contracts do not produce any binding effect on the benevolent party just as in the case of lending an item to someone for use (*ʿāriyya*). The eventual repayment of the loan amount results in an exchange of a commodity or currency for its equivalent and also cannot contain any stipulation of deferment due to the prohibition of usury contained in the ḥadīth. A loan thus always remains repayable on demand.

باب الربا
Chapter: *Ribā* (Usury)[140]

الربا محرم في كل مكيل أو موزون إذا بيع بجنسه متفاضلا
فالعلة فيه الكيل مع الجنس أو الوزن مع الجنس
فإذا بيع المكيل أو الموزون بجنسه مثلا بمثل جاز البيع وإن تفاضلا لم يجز

Usury is prohibited in any item measured by volume or weight when it is sold in exchange for the same genus in unequal quantities.[141] Thus, the effective cause (for the prohibition) shall be volume with genus or weight with genus.[142] Based on the above if an item measured by volume or weight

[140] It must be noted that the word 'usury' is used throughout this chapter to refer to the types of *ribā* specifically prohibited in the Sharīʿa and not to the common definition of usury as the 'the action or practice of lending money at unreasonably high rates of interest.'

[141] Although the author of the *Mukhtaṣar*, as well as those of other classical Ḥanafī fiqh works, commence the chapter on usury with a discussion on *ribā al-faḍl*, also known as *ribā al-ḥadīth* and *ribā al-buyūʿ*, the other more common type of usury is *ribā al-Qur'ān* or *ribā al-jāhiliyya* which is the excess, resulting from predetermined interest, which a lender receives over and above the principal amount he lent out. This is regarded as the primary form of usury and has been expressly prohibited in Qurʾān 3:130.

[142] The prohibition of this type of usury is known as *ribā al-faḍl* and is derived from the famous ḥadīth in which the Prophet ﷺ directed that the sale of six items (viz. wheat, barley, dates, salt, gold and silver) in exchange for an item of the same genus must be 'like for like' and 'hand to hand.' Although the ḥadīth enumerated six items, Islamic jurists are unanimous that the law may be extended to other items on the basis of *qiyās* (analogical deduction.) However there is a difference of opinion amongst the jurists with respect to the effective cause for the prohibition. The Ḥanafīs extend the law to any item measured by volume or weight when it is exchanged for an item of the same genus.

is sold in exchange for an item of the same genus in equal quantities it shall be valid. If the quantities are not equal it shall not be valid.

ولا يجوز بيع الجيد بالردئ مما فيه الربا إلا مثلا بمثل

The sale of the superior quality of an item in which there is *ribā* in exchange for the inferior quality[143] of the same item shall not be valid unless it is like for like.[144]

فإذا عدم الوصفان الجنس والمعنى المضموم إليه حل التفاضل والنساء وإذا وجدا حرم التفاضل والنساء وإذا وجد أحدهما وعدم الآخر حل التفاضل وحرم النساء

When both attributes, the genus and the factor linked to it,[145] are not found it shall be valid to exchange them in unequal quantities and (also) on credit. When both attributes are found, exchanging them in unequal quantities or on credit shall be prohibited. When only one attribute is found, and the other is not found, exchanging such items in unequal quantities shall be valid but exchanging them on credit shall be prohibited.[146]

[143] When an item of *ribā* is exchanged for an item of the same genus, quality is of no consideration as per the ḥadīth.

[144] The term 'like for like' refers to an exchange in equal quantities.

[145] This factor may be either volume (*kayl*) or weight (*wazn*). A more comprehensive term in Arabic is *qadar* (i.e. quantity.)

[146] An example of this is the sale of one apple in exchange for two apples. Although they are of the same genus, apples are not measured by weight or volume. The transaction is thus valid as long as it is not on a deferred basis.

وكل شيء نص رسول الله صلى الله عليه وسلم على تحريم التفاضل فيه كيلا فهو مكيل أبدا وإن ترك الناس الكيل فيه مثل الحنطة والشعير والتمر والملح وكل ما نص على تحريم التفاضل فيه وزنا فهو موزون أبدا مثل الذهب والفضة وما لم ينص عليه فهو محمول على عادات الناس

Any item the exchange of which the Prophet ﷺ explicitly prohibited in unequal quantities on the basis of volume shall be deemed to be an item measured by volume always, even if people leave out measuring it by volume e.g. wheat, barley, dates and salt.[147] Any item the exchange of which the Prophet ﷺ explicitly prohibited in unequal quantities on the basis of weight shall be deemed to be an item measured by weight always e.g. gold and silver. Any (other) item for which there is no explicit text shall be judged as per the custom of the people.

وعقد الصرف ما وقع على جنس الأثمان يعتبر فيه قبض عوضيه في المجلس وما سواه مما فيه الربا يعتبر فيه التعيين ولا يعتبر فيه التقابض

In a contract of *ṣarf*, which occurs on the genus of currency[148], taking possession of both items of exchange in the same contractual session (*majlis*) shall be required. In all other items, besides this, in which there is usury, specification (of the item) shall be required and taking possession shall not be required.[149]

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[147] Thus, in the sale of such items in exchange for the same genus e.g. wheat for wheat, it is necessary for the quantities to be equal by measure of volume. Observing equality of the quantities on either side by measure of weight will neither be sufficient nor necessary for validity.

[148] The Arabic word used here is *athmān* which is the plural of *thaman* (price). It refers to items used as media of exchange e.g. gold, silver and other forms of currency.

[149] The sale transaction on such items shall be valid once they are adequately pinpointed by means of specification. Physical possession of the items is not necessary for the transaction to be valid unlike in the case of currency. This is because currency (money) does not become specific even when pinpointed as mentioned previously.

ولا يجوز بيع الحنطة بالدقيق ولا بالسويق

The sale of wheat in exchange for (wheat) flour or *sawīq* shall not be valid.[150]

ويجوز بيع اللحم بالحيوان عند أبي حنيفة وأبي يوسف

The sale of meat in exchange for the animal[151] shall be valid according to Imām Abū Ḥanīfa and Imām Abū Yūsuf.

ويجوز بيع الرطب بالتمر مثلا بمثل والعنب بالزبيب

The sale of fresh dates in exchange for dry dates shall be valid in equal quantities.[152] The same law shall apply to grapes in exchange for raisins.

ولا يجوز بيع الزيتون بالزيت والسمسم بالشيرج حتى يكون الزيت والشيرج أكثر مما في الزيتون والسمسم فيكون الدهن بمثله والزيادة بالثجير

The sale of olives in exchange for olive oil and (the sale of) sesame seeds in exchange for sesame oil shall not be valid unless the olive oil or the sesame

[150] Wheat, wheat flour and *sawīq* (type of food made from crushed wheat) are considered to be of the same genus and therefore the sale of one for the other must be in equal quantities. However achieving equality between them is not possible even though the volumes may be the same because wheat is loosely packed as compared to wheat flour which is packed tightly. The law therefore does not permit this sale at all.

[151] Since this is the sale of an item measured by weight (i.e. meat) in exchange for one that is not measured by weight (i.e. the animal) the sale shall be valid even if the quantities are not equal. Imām Muḥammad is of the view that this is not valid except if the meat in the animal is less than the meat given in exchange as in the case of the sale of olives in exchange for olive oil and (the sale of) sesame seeds in exchange for sesame oil to be discussed shortly hereafter.

[152] This is the view of Imām Abū Ḥanīfa on the basis that dates, whether they are fresh or dry, are of the same genus and therefore the sale of one for the other is valid in equal quantities. The principle applied is that differences that come about naturally, as between fresh and dry fruit, are not given consideration as opposed to differences caused by human action such as those between wheat and flour.

oil is more than what is (contained) in the olive fruit or the sesame seed - so that the oil shall be in exchange for its equivalent and the extra shall be in exchange for the residue.[153]

ويجوز بيع اللحمان المختلفة بعضها ببعض متفاضلا
وكذلك ألبان البقر والغنم وخل الدقل بخل العنب

The sale of different types of meat in exchange for one another in unequal quantities shall be valid.[154] The same law shall apply to the sale of cow's milk in exchange for goat's milk and (the sale) of date vinegar in exchange for grape vinegar.

ويجوز بيع الخبز بالحنطة والدقيق متفاضلا

The sale of bread in exchange for wheat or (wheat) flour in unequal quantities shall be valid.[155]

ولا ربا بين المولى وعبده ولا بين المسلم والحربي في دار الحرب

There shall be no usury between a master and his slave[156] and nor between a Muslim and a citizen in *dār al-ḥarb*.[157]

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[153] Since oil is an item sold by weight it has to be exchanged for an equal quantity without there being any excess that is free of a reciprocal exchange or else it would result in *ribā*.

[154] When the origins are of a different genus the derivatives are deemed to be of a different genus, and the sale of one for the other will be valid even in unequal quantities.

[155] Bread, even though it originates from wheat changes to the extent that is no longer sold by volume, but rather in number or by weight as per the custom. It therefore differs from wheat which is sold by volume.

[156] A slave, together with his possessions, is owned by the master as long as the slave is not in debt. Hence any transaction between a master and his slave is not deemed a genuine transaction and therefore cannot give rise to usury.

[157] The wealth of the citizens of a state that is at war with the Muslim state (known as *dār al-ḥarb*) does not enjoy the status of inviolability within *dār al-ḥarb*. A Muslim is legally permitted to take such wealth as long as it doesn't amount to dishonesty or breach of any trust or agreement. In a mutually agreed transaction no such dishonesty or breach is found and taking such wealth is therefore permitted.

باب السلم
Chapter: *Salam* (The Forward Sale)

السلم جائز في المكيلات والموزونات والمعدودات التي لا تتفاوت
كالجوز والبيض وفي المذروعات

A forward sale[158] shall be valid for items measured by volume or weight, counted items that do not differ from one another such as walnuts and eggs[159] and items measured in length.

ولا يجوز السلم في الحيوان ولا في أطرافه ولا في الجلود عددا
ولا في الحطب حزما ولا في الرطبة جرزا

The forward sale shall not be valid for animals, animal parts, animal skins[160] by number; wood in bundles and vegetables in bunches.[161]

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[158] A forward sale refers to the sale of a specified item or commodity that the seller does not have in his possession but agrees to deliver on a specified date in the future in exchange for advance payment by the purchaser. In essence it is the sale of a deferred item for upfront payment. The general rule in Islamic law is that a person cannot sell what he does not have. However, the forward sale transaction has been allowed, on an exceptional basis based on the ḥadīth, and is valid for items that can be specified with a considerable degree of accuracy such as those mentioned by the author. The deferred item of sale is a specified fungible commodity to be delivered by the seller whether it is produced or procured by him. The basic purpose of this sale was to meet the needs of the indigent e.g. farmers who needed money to grow their crops and to feed their families up to the time of harvest. After the prohibition of *ribā*, they could not take usurious loans and they were therefore allowed to sell their agricultural products in advance.

[159] The differences between such items are deemed insignificant as they generally have no bearing on the value of the item i.e. traders do not normally demand a higher price for one as opposed to another.

ولا يجوز السلم حتى يكون المسلم فيه موجوداً من حين العقد إلى حين المحل

The forward sale shall not be valid unless the item of sale[162] is available from the time of the contract until the time of delivery.[163]

ولا يصح السلم إلا مؤجلا ولا يجوز إلا بأجل معلوم

The forward sale shall only be valid on a deferred basis[164] and with a known[165] period of deferment.

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[160] Since these items differ significantly from one another it is not possible to accurately describe them in advance and hence a forward sale is not possible for such items.

[161] If the size of the bundle or bunch can be accurately described by specifying the length of the string used to tie the bundle or bunch and the type of wood or vegetable then a forward sale may be contracted.

[162] The item of sale in a forward sale is called the *muslam fīh,* the seller is called the *muslam ilayh* and the purchaser is known as the *rabb al-salam.*

[163] An essential element in a sale is the ability of the seller to deliver the item of sale. In the case of a forward sale, since the seller does not have the item at the time of the contract the seller must possess the ability to obtain such item from the market. Hence, the Ḥanafī scholars impose the condition of availability i.e. the item must be available for sale in the market throughout the duration of the *salam* contract until the time of delivery.

[164] It is not valid to contract a forward sale on a cash basis i.e. without any mention of deferment of the price as this will mean that the seller is obliged to deliver the item of sale immediately upon the demand of the purchaser. This goes against the rationale of the concession granted by Sharīʿa for the forward sale viz. to grant reprieve to an indigent seller to obtain the item of sale before delivery becomes due.

[165] Ambiguity with respect to the period of deferment has the potential of leading to dispute and will invalidate the transaction.

ولا يجوز السلم بمكيال رجل بعينه ولا بذراع رجل بعينه
ولا في طعام قرية بعينها ولا في ثمرة نخلة بعينها

The forward sale shall not be valid (if the quantity is specified) by means of a specific measuring container or measuring stick belonging to one person.[166] It shall also not be valid if the item of sale is the grain of a specific village or the fruit of a specific date-palm.[167]

ولا يصح السلم عند أبي حنيفة إلا بسبع شرائط تذكر في العقد جنس معلوم ونوع معلوم وصفة معلومة ومقدار معلوم وأجل معلوم ومعرفة مقدار رأس المال إذا كان مما يتعلق العقد على قدره كالمكيل والموزون والمعدود وتسمية المكان الذي يوافيه فيه إذا كان له حمل ومؤنة وقال أبو يوسف ومحمد لا يحتاج إلى تسمية رأس المال إذا كان معينا ولا إلى مكان التسليم ويسلمه في موضع العقد

The forward sale shall only be valid, according to Imām Abū Ḥanīfa, if the following seven conditions are recorded in the contract: known genus, known type, known quality and known quantity (of the item of sale), known period (for delivery), mention of the quantum of the capital sum if the contract is linked to its quantum e.g. an item measured by volume or weight and a counted item,[168] and specification of the place of delivery if the item

[166] This refers to a measuring container the quantity of which is not known or a measuring stick the length of which is not known. Since delivery in the forward sale is deferred, it is not improbable that the specific measuring container or stick will get lost or destroyed before the due date of delivery. This will result in uncertainty with respect to the quantity or length and may lead to a dispute.

[167] This is due to the possibility that the specific village or date-palm will not bear any crop or produce in that particular year resulting in the seller's inability to deliver. If the ascription to a specific village is merely a description of the type of item and not a restriction of its origin the contract will be valid.

[168] If the contract is not linked to the quantum of the capital sum (i.e. the purchase price), as is the case when the purchase price is an identified garment, there is no need to mention its specifications i.e. length and breadth.

(of sale) involves transport costs.[169] Imām Abū Yūsuf and Imām Muḥammad are of the view that there is no need to mention the quantum of the capital sum if it is (physically) identified and (likewise there is no need) to specify the place of delivery, which shall occur at the place of the contract.

ولا يصح السلم حتى يقبض رأس المال قبل أن يفارقه

The forward sale shall not be valid until the seller takes possession of the capital sum before he separates from the purchaser.[170]

ولا يجوز التصرف في رأس المال ولا في المسلم فيه قبل قبضه
ولا تجوز الشركة ولا التولية في المسلم فيه قبل قبضه

It shall not be valid to transact in the capital sum,[171] nor in the item of sale[172], before (taking) possession (of the same.) Partnership (*sharika*) and *tawliya*[173] shall (also) not be valid in the item of sale before (taking) possession of the same.

[169] If delivery of the item of sale does not involve any transport costs, it will not be necessary to specify the place of delivery and the seller may hand over the item of sale to the purchaser wherever he meets him.

[170] A condition for the forward sale contract to remain valid is that delivery of the capital sum (purchase price) must occur before the seller and purchaser physically separate. If not, it may result in the exchange of a debt for a debt which has been prohibited in the ḥadīth.

[171] Transacting in the capital sum prior to taking possession will contravene the condition of delivery of the capital sum as mentioned in the footnote above.

[172] As discussed in the chapter on murābaḥa, if a person purchases any item that is moveable he is not permitted to transact in it until he takes possession of the same.

[173] These contracts entail transacting in the item of sale prior to taking possession and therefore not allowed.

ويجوز السلم في الثياب إذا سمى طولا وعرضا ورقعة ولا يجوز السلم في الجواهر
ولا في الخرز ولا بأس في السلم في اللبن والآجر إذا سمى ملبنا معلوما

A forward sale shall be valid for cloth if the length, width and texture of the cloth are specified. A forward sale shall not be valid for gemstones or pearls.[174] There is no harm in (concluding) a forward sale for baked and unbaked bricks if the mould is clearly specified.[175]

وكل ما أمكن ضبط صفته ومعرفة مقداره جاز السلم فيه
وما لا يمكن ضبط صفته ولا يعرف مقداره لا يجوز السلم فيه

A forward sale may be permissibly contracted for any item the description and quantity of which can be accurately specified. If the description and quantity of an item cannot be accurately specified a forward sale cannot be contracted for such item.[176]

ويجوز بيع الكلب والفهد والسباع ولا يجوز بيع الخمر والخنزير
ولا يجوز بيع دود القز إلا أن يكون مع القز ولا النحل إلا مع الكوارات

The sale of a dog, cheetah or predatory animal shall be valid.[177] The sale of wine or a pig shall not be valid.[178] The sale of a silkworm shall not be valid unless it is (sold together) with the silk and the sale of bees shall not be valid unless (they are sold together) with the hives.[179]

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[174] Since these items differ significantly from one another it is not possible to clearly describe them at the time of the contract.

[175] The length, breadth and height of the mould must be clearly specified.

[176] This is the fundamental principle with respect to which items a forward sale may be concluded for.

[177] Although the consumption of these animals is prohibited they have other permissible uses e.g. dogs can be used for guarding and hunting purposes. The skins of such animals may also be used if the animal is slaughtered or the skin is tanned. The sale of such animals is therefore valid.

[178] These items are deemed *najis* (impure) and may not be used or sold by Muslims.

[179] Insects such as silkworms and bees may not be sold. However, they may be

وأهل الذمة في البياعات كالمسلمين إلا في الخمر والخنزير خاصة فإن عقدهم على الخمر كعقد المسلم على العصير وعقدهم على الخنزير كعقد المسلم على الشاة

The *ahl al-dhimma*[180] shall be like Muslims with respect to commercial transactions with the (specific) exception of wine and pigs.[181] Their contract on wine shall be like the contract of a Muslim on (grape) juice and their contract on pigs shall be like the contract of a Muslim on sheep.

included in the sale that takes place for the silk or beehives.

[180] *Ahl al-dhimma or dhimmīs* refer to non-Muslim subjects living in a Muslim country. As legal subjects of the law, the rules of the Sharīʿa relating to commercial transactions shall apply to non-Muslims just as they apply to Muslims.

[181] Since these items are regarded in their religion to be items of value (*māl*) they will be allowed to trade in them.

باب الصرف
Chapter: *Ṣarf* (Currency Exchange)

الصرف هو البيع إذا كان كل واحد من العوضين من جنس الأثمان
فإن باع فضة بفضة أو ذهباً بذهب لم يجز إلا مثلا بمثل وإن اختلفا في الجودة والصياغة
ولابد من قبض العوضين قبل الافتراق وإذا باع الذهب بالفضة جاز التفاضل ووجب
التقابض وإن افترقا في الصرف قبل قبض العوضين أو أحدهما بطل العقد

Ṣarf is a sale (transaction) in which both exchanges are from the genus of currency.[182] If a person sells silver in exchange for silver or gold in exchange for gold the transaction shall only be valid if the quantities are equal even though the quality or form differs.[183] It is also necessary that possession of both exchanges be taken before the parties separate.[184] If a person sells gold in exchange for silver the quantities may differ but taking possession of both exchanges shall be necessary.[185] If, in a *ṣarf* transaction, the parties

[182] The Arabic word '*thaman*' is used which translates as 'price' and refers primarily to gold and silver. These are always regarded to be currency (*thaman*) by their nature in whichever form they may be. Other items (e.g. copper coins known as *fulūs*) may also be deemed currency if they are in common usage as such. The same applies to modern banknotes.

[183] This follows from the Prophetic ḥadīth on the prohibition of *ribā* as discussed in the chapter on usury.

[184] This refers to physical separation. The contract remains valid as long the parties are physically together. If they physically separate without taking possession of any one of the two exchanges the contract is rendered void because the exchanges do not become specific, due to their being *thaman*, resulting in the prohibited *nasaʾ* referred to in the chapter on usury. If neither of the exchanges is taken possession of, it will also result in the 'sale of a debt for a debt' which is also prohibited in the ḥadīth.

[185] As discussed in the chapter on usury, when only one of the effective causes of *ribā* is found, as is the case here, it is permissible for the quantities of the exchanges to

separate prior to taking possession of both or one of the two exchanges, the transaction shall be (rendered null and) void.

ولا يجوز التصرف في ثمن الصرف قبل قبضه

It shall not be valid to transact in the price of the *ṣarf* transaction prior to taking possession of the same.[186]

ويجوز بيع الذهب بالفضة مجازفة

The sale of gold in exchange for silver by estimation[187] (i.e. without measuring the quantity) shall be valid.

ومن باع سيفا محلى بمائة درهم وحليته خمسون درهما فدفع من ثمنه خمسين جاز البيع وكان المقبوض حصة الفضة وإن لم يبين ذلك وكذلك إن قال خذ هذه الخمسين من ثمنهما فإن لم يتقابضا حتى افترقا بطل العقد في الحلية والسيف إن كان لا يتخلص إلا بضرر وإن كان يتخلص بغير ضرر جاز البيع في السيف وبطل في الحلية

If a person sells a trimmed[188] sword in exchange for one hundred dirhams, with the (weight of the) trimming being fifty dirhams, and the purchaser hands over fifty dirhams of the price, the sale shall be valid. The dirhams that were taken possession of shall be (deemed as being in exchange for) the

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differ but selling them on credit is not permissible. It was also discussed in that chapter that in a *ṣarf* transaction to avoid the prohibition of credit it will be necessary to take possession in the contractual session. Failure to do so will render the contract void.

[186] Transacting in the price before taking actual possession of the same deters from the requirement necessary for the *ṣarf* transaction to remain valid viz. taking possession of both exchanges. Such a transaction will therefore not be valid.

[187] Since the genus differs, equality in quantity is not required and therefore measurement is not necessary. However taking possession before separation will still be required.

[188] This refers to a sword made of steel that has trimmings or decorations of silver.

silver (trimming's) portion even though he didn't state that.[189] Similarly, if he said 'Take these fifty being the price of both.'[190] If they (i.e. the contracting parties) separate without taking possession (of anything), the contract shall be void in (both) the trimming and the sword - if it cannot be stripped without damage.[191] If it can be stripped without (causing) damage the sale shall be valid in the sword and void in the trimming.

ومن باع إناء فضة ثم افترقا وقد قبض بعض ثمنه بطل العقد فيما لم يقبض
وصح فيما قبض وكان الإناء مشتركاً بينهما وإن استحق بعض الإناء كان المشتري بالخيار
إن شاء أخذ الباقي بحصته من الثمن وإن شاء رده
وإن باع قطعة نقرة فاستحق بعضها أخذ ما بقي بحصته ولا خيار له

If a person sells a silver utensil and thereafter the two contracting parties separate whilst only part of the price has been taken possession of, the contract shall be void in the part for which possession (of the price) was not taken and valid in the part for which possession was taken.[192] The utensil shall become jointly owned by the two parties.[193] If a third party becomes

[189] The assumption is made that a Muslim will not willingly transact in a manner not acceptable in Sharīʿa. Since it is necessary to take possession of the portion of the price that is in exchange for the silver, it shall be assumed that this was the intent of the purchaser even if he does not state this.

[190] In the Arabic language the dual suffix is sometimes used but the singular is intended as in Qur'ān 55:22, "Out of these two [bodies of water] come pearls and coral." The assumption is therefore made that he is intending only the silver trimming and thereby transacting in a manner acceptable in Sharīʿa.

[191] Since the sword cannot be stripped of the trimming without causing damage the sale is not valid in the sword as well. This is similar to the case of the sale of a beam in a ceiling as discussed previously. In both cases the seller is not able to hand over the item of sale to the purchaser without suffering additional damage.

[192] The *fasād* (corruption) does not spread to both parts because it is an incidental development caused by the separation after the transaction was validly concluded.

[193] Since the contract was rendered void in part and joint ownership was created in the remainder on account of his own action (of separation) he will not have the

entitled to part of the utensil, the purchaser shall have the option of either taking the remainder for its portion of the price or returning the item.[194] If he sells a piece of silver and thereafter a third party becomes entitled to part of it, he (i.e. the purchaser) shall (have to) take the remainder for its portion of the price without any option[195] (of returning it.)

ومن باع درهمين ودينارا بدينارين ودرهم جاز البيع وجعل كل واحد من الجنسين بالجنس الآخر ومن باع أحد عشر درهما بعشرة دراهم ودينار جاز البيع وكانت العشرة بمثلها والدينار بدرهم

If a person sells two dirhams and one dīnār in exchange for two dīnārs and one dirham the sale shall be valid and each of the two types shall be deemed to be in exchange for the other.[196] If a person sells eleven dirhams in exchange for ten dirhams and one dīnār, the sale shall be valid. Ten dirhams shall be (deemed to be) in exchange for its equivalent and the one dīnār shall be (deemed to be) in exchange for the (remaining) dirham.[197]

ويجوز بيع درهمين صحيحين ودرهم غلة بدرهم صحيح ودرهمين غلة

The sale of two whole dirhams and one inferior[198] dirham in exchange for one whole dirham and two inferior dirhams shall be valid.[199]

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option of cancelling the sale and returning the item unlike the case of *istiḥqāq* (entitlement) that follows.

[194] This option is granted to the purchaser since the resultant joint ownership in the remainder is deemed to be a defect in any item that cannot be divided or distributed and this was not caused by his action unlike the previous case.

[195] Since no damage will be caused to the piece of silver by splitting it, it can be divided and joint ownership will not be deemed a defect in it.

[196] Since the contracting parties did not specify the manner of allocation for the individual constituents of the subject matter of sale it will be allocated in a manner that renders the contract valid rather than that which renders the contract void.

[197] Refer footnote above.

[198] A *ghalla* dirham could refer to a broken dirham or a dirham that is of inferior quality. Such a dirham is not accepted by the *bayt al-māl* (treasury) but is accepted by traders in the market.

وإذا كان الغالب على الدراهم الفضة فهي فضة وإن كان الغالب على الدنانير الذهب فهي ذهب ويعتبر فيهما من تحريم التفاضل ما يعتبر في الجياد وإن كان الغالب عليهما الغش فليسا في حكم الدراهم والدنانير فإذا بيعت بجنسها متفاضلا جاز

If the preponderant portion of the dirham (coin) is silver, it shall be (deemed to be) silver. If the preponderant portion of the dīnār (coin) is gold, it shall be (deemed to be) gold[200] and the prohibition of the exchange of these coins in unequal quantities shall apply as it applies in the case of genuine coins.[201] If the preponderant portion of these coins is alloy then the law of gold and silver coins shall not apply and it shall be valid to exchange them for one another in unequal quantities.[202]

وإذا اشترى بها سلعة ثم كسدت وترك الناس المعاملة بها بطل البيع عند أبي حنيفة وقال أبو يوسف عليه قيمتها يوم البيع وقال محمد عليه قيمتها آخر ما تعامل الناس بها

If a person purchases goods with these (alloyed) coins and thereafter the coins go out of circulation and people abandon using them as currency the

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[199] Since the weight of the silver is equal on both sides of the transaction – even though the dirhams are not whole or of inferior quality – the requirements of the Sharīʿa for the validity of such a transaction are met viz. equality in weight and disregard of quality.

[200] Gold and silver cannot be ordinarily minted without the addition of some alloy (e.g. copper.) At times alloys are mixed with the gold or silver naturally in the ground. Preponderance is hence the criterion for classifying a coin as gold and silver for the purposes of application of the laws of sale, zakāh etc.

[201] The entire coin is deemed to be gold or silver and the alloy is deemed to be non-existent. Thus, the sale of these coins for one another will have to be in equal quantities and it will not be possible to allocate the metals in one coin to the opposite metals in the other as in the following case.

[202] Since they are not considered gold or silver coins, but alloyed coins that contain a certain amount of gold or silver, they may be exchanged in unequal quantities by allocating the metals in one coin to the opposite metals in the other i.e. the gold or silver will be in exchange for the alloy.

sale shall be rendered void according to Imām Abū Ḥanīfa.[203] According to Imām Abū Yūsuf, the purchaser shall be liable for the value (of the coins) on the day of the sale. According to Imām Muḥammad, the purchaser shall be liable for the value (of the coins) on the last day that people used them as currency.[204]

ويجوز البيع بالفلوس النافقة وإن لم تتعين وإن كانت كاسدة لم يجز البيع بها حتى يعينها وإذا باع بالفلوس النافقة ثم كسدت بطل البيع عند أبي حنيفة

A sale shall be valid in exchange for *fulūs*[205] (that are) in circulation even though they are not specifically identified.[206] If these coins are not in circulation the sale shall not be valid unless they are specifically identified.[207] If a sale is concluded in exchange for *fulūs* in circulation and

[203] Since these coins are no longer in circulation as currency the sale is now left without any purchase price which renders it void according to Imām Abū Ḥanīfa. The item of sale will therefore have to be returned and if it is not possible to return the item itself, its value or equivalent must be returned.

[204] Imām Abū Yūsuf and Imām Muḥammad regard the sale to be valid but since the purchaser cannot pay the stipulated purchase price he will be liable for its value. They, however, differ regarding the day on which this value is determined. Imām Abū Yūsuf is of the view that the day of the sale shall be considered since the sale transaction was the initial cause of the indebtedness. Imām Muḥammad is of the view that the last day that people used them as currency is considered since this was the day the shift from the stipulated purchase price to its value had to be made.

[205] *Fulūs* refers to coins made of copper or other similar metals besides gold and silver.

[206] Items that are deemed currency do not need to be specifically identified at the time of the sale. The specification of the quantity (e.g. ten *fulūs*) will be sufficient for the validity of the sale.

[207] This is because they are now treated as goods since they are no longer currency as per customary usage.

thereafter they go out of circulation the sale shall be rendered void according to Imām Abū Ḥanīfa.[208]

ومن اشترى شيئا بنصف درهم فلوسا جاز البيع وعليه ما يباع بنصف درهم من الفلوس

If a person purchases something for 'half a dirham of *fulūs*' the sale shall be valid[209] and he shall be liable for the (number of) *fulūs* that are (normally) sold for half a dirham.

ومن أعطى الصيرفي درهما وقال أعطني بنصفه فلوسا وبنصفه نصفا إلا حبة فسد البيع في الجميع عند أبي حنيفة وقال أبو يوسف ومحمد جاز البيع في الفلوس وبطل فيما بقي ولو قال أعطني نصف درهم فلوسا ونصفا إلا حبة جاز البيع وكانت الفلوس والنصف إلا حبة بدرهم

If a person gives a money exchanger one dirham and says 'Give me in exchange for half of it *fulūs*, and for (the other) half of it half (a dirham) less one *ḥabba*, the sale shall be invalid[210] entirely, according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad, the sale shall be valid in the *fulūs* and void in the remainder.[211] If he says 'Give me half a dirham of

[208] The same difference of opinion between the three Ḥanafī Imāms applies here as in the case of the alloyed coins mentioned above.

[209] Since it is commonly known how many *fulūs* are given in exchange for half a dirham, the sale is valid even though the number of *fulūs* was not specified in the transaction.

[210] The allocation of half of the dirham for *fulūs*, and the other half for half (a dirham) less one *ḥabba*, as stipulated in the contract, is not valid since the sale of half a dirham for half (a dirham) less one *ḥabba* is *ribā* due to the quantities of silver not being equal. Since this is a single transaction the corruption spreads, according to Imām Abū Ḥanīfa, to the sale of the *fulūs* as well due to the strength of the cause of invalidation. It is also not possible to alter the allocation stipulated by the contracting parties.

[211] Imām Abū Yūsuf and Imām Muḥammad treat this transaction as two separate sales and regard one to be valid and the other void.

fulūs and half (a dirham) less one *ḥabba*' the sale shall be valid and the *fulūs* and the half (dirham) less one *ḥabba* shall be in exchange for one dirham.[212]

[212] In this case he did not stipulate the allocation in the contract. We can therefore allocate it in a manner that renders the sale valid in Sharīʿa viz. half of the full dirham less one *ḥabba* in exchange for its equivalent and the balance of the full dirham in exchange for the *fulūs*.

كتاب الرهن
Chapter: *Rahn* (Pledge)

الرهن ينعقد بالإيجاب والقبول ويتم بالقبض

فإذا قبض المرتهن الرهن محوزا مفرغا مميزا تم العقد فيه وما لم يقبضه فالراهن بالخيار

إن شاء سلمه وإن شاء رجع عن الرهن فإذا سلمه إليه وقبضه دخل في ضمانه

A pledge[213] shall be contracted by means of offer and acceptance and shall become complete by (taking) possession.[214] Hence, if the pledgee takes possession of the pledge gathered[215], vacated[216] and delineated[217] the

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[213] *Rahn* (pledge) is a valid contract in Islamic law (*Sharīʿa*) and taking security for a debt has been allowed in the Qurʾān.

Qurʾān 2:283 states, "If you are on a journey, and cannot find a scribe, something should be handed over as security, but if you decide to trust one another, then let the one who is trusted fulfil his trust; let him be mindful of Allah, his Lord. Do not conceal evidence: anyone who does so has a sinful heart, and Allah is fully aware of everything you do."

The Prophet ﷺ himself on several occasions provided his creditors with security and we learn from the ḥadīth that when the Prophet ﷺ passed away, his shield was pledged with a Jewish man in Madīna as collateral.

[214] The *rahn* contract only becomes complete and binding once possession is taken. This is unlike a sale contract which is binding once the offer and acceptance takes place.

[215] If the pledged item is not gathered but scattered e.g. if fruit on a tree or crops on land are pledged without the tree and the land, the *rahn* will not be valid.

[216] The pledged item must not be occupied by any asset or right of the pledgor e.g. If a tree with fruit or a land with crops is pledged excluding the fruit and the crops from the pledge, it will not be valid.

[217] The pledge of *mushāʿ* (common property in which a person holds an undivided interest) is not valid whether the property is divisible or not and whether this pledge is given to the partner in that property or any other person.

contract shall become complete therein. As long as he (the pledgee) hasn't taken possession of the same the pledgor shall have the option of either handing it over or retracting the pledge.[218] Once he hands it over and (the pledgee) takes possession of it, it shall enter into his liability.

ولا يصح الرهن إلا بدين مضمون وهو مضمون بالأقل من قيمته ومن الدين
فإذا هلك في يد المرتهن وقيمته والدين سواء صار المرتهن مستوفيا لدينه حكما
وإن كانت قيمة الرهن أكثر من الدين فالفضل أمانة في يده
وإن كانت أقل سقط من الدين بقدرها ورجع المرتهن بالفضل

The pledge shall only be valid for a liable debt.[219] It (the pledge) shall be held in liability for the lesser of its value and the debt. If it is destroyed in the hand of the pledgee, and its value[220] is equal to the debt, the pledgee shall (be deemed to) have received (full settlement of) his debt.[221] If the value of the pledge is more than (that of) the debt, the excess shall be a trust[222] in his hand. If it is lesser, the debt shall fall away proportionately and the pledgee shall claim the remainder.

ولا يجوز رهن المشاع ولا رهن ثمرة على رؤوس النخل دون النخل
ولا زرع في الأرض دون الأرض ولا يجوز رهن الأرض والنخل دونهما

The pledge of common property[223], fruit on the date-palm without the date-palm, crops on land without the land and (the pledge of) land and a date-palm without them (i.e. the crops and fruit) shall not be valid.[224]

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[218] Since possession has not been taken, the pledge contract is not binding.

[219] A pledge in lieu of items that are not held in liability, but in trust as appears later, is not valid e.g. items deposited for safekeeping (*wadīʿa*.) This is because a pledge is taken to secure a debt and items that are not held in liability cannot be secured.

[220] The value on the date of the *rahn* contract shall be considered.

[221] Since the value of the pledged item, for which the pledgee is liable, is equal to that of the debt the two amounts shall be set off against each other.

[222] He will not be liable for the excess as this is deemed to be held in a fiduciary capacity (*amāna*), unless he is guilty of misconduct or negligence.

[223] *Mushāʿ* refers to common property in which a person holds an undivided interest

ولا يصح الرهن بالأمانات كالودائع والمضاربات ومال الشركة

A pledge in lieu of items held in trust such as deposits[225]and assets in a *muḍāraba* and *sharika* (partnership) shall not be valid.[226]

ويصح الرهن برأس مال السلم وثمن الصرف والمسلم فيه
فإن هلك في مجلس العقد تم الصرف والسلم وصار المرتهن مستوفياً لدينه

A pledge in lieu of the capital of *salam*, the price in a *ṣarf* transaction and the item of sale in a *salam* transaction shall be valid.[227] If it (the pledge) is destroyed within the contractual session the *ṣarf* or *salam* transaction shall be complete and the pledgee shall (be deemed to) have received (full settlement of) his debt.

وإذا اتفقا على وضع الرهن على يد عدل جاز
وليس للمرتهن ولا للراهن أخذه من يده فإن هلك في يده هلك من ضمان المرتهن

The contracting parties may agree to place the pledge in the hand of an *ʿadl*[228] and the pledgee or the pledgor may not take it from his hand. If it is

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e.g. a percentage share held in immovable property. Such an asset may not be pledged whether it is divisible or not and whether this pledge is given to the partner in that property or any other person.

[224] The pledge of such items is not valid due to their not fulfilling the requirements referred to earlier i.e. the pledged item cannot be scattered or occupied by the asset or right of the pledgor.

[225] Deposits refer to items held as *wadīʿa* for safekeeping and should not be confused with modern day deposits in bank accounts which are generally classified by jurists as loans (*qarḍ*).

[226] Since these items are held in trust and the holder is not liable for them if they are destroyed, a pledge may not be taken for such items.

[227] These are liable debts and therefore a pledge may be taken for them. Nevertheless, taking possession, of the capital in a *salam* transaction and the price in a *ṣarf* transaction, in the contractual session (*majlis*) remains a necessary requirement for the validity of their contracts as discussed in the relevant chapters.

[228] The word *ʿadl* means upright and refers to any third party deemed to be upright

destroyed in the hand of the ʿ*adl*, the destruction shall the liability of the pledgee.[229]

ويجوز رهن الدراهم والدنانير والمكيل والموزون فإن رهنت بجنسها وهلكت هلكت بمثلها من الدين وإن اختلفا في الجودة والصناعة

The pledge of dirhams, dīnārs, items of dry-measure and items of weight shall be valid. If they are pledged in lieu of the same genus and they get destroyed, an equivalent amount of the debt shall be set off, even though there may be a difference in quality and craftsmanship.[230]

ومن كان له دين على غيره فأخذ منه مثل دينه فأنفقه ثم علم أنه كان زيوفا فلا شيء له عند أبي حنيفة وقال أبو يوسف ومحمد يرد مثل الزيوف ويرجع بالجياد

If a person who was owed a debt by another person receives the equivalent of his debt[231] and spends the same, and thereafter realizes that the coins were *zuyūf*[232] he shall not be entitled to anything according to Imām Abū Ḥanīfa.[233] According to Imām Abū Yūsuf and Imām Muḥammad he shall return the equivalent of the *zuyūf* coins and (thereafter) claim genuine coins.

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and trustworthy by the contracting parties.

[229] This is because, with respect to the monetary worth of the pledged item held as security for payment of the debt, the ʿ*adl* acts on behalf of the pledgee who is liable for the pledged item once he takes possession of the same.

[230] When two usurious items of the same genus are set-off against each other no consideration is given to quality and form - as discussed in the chapter on usury.

[231] He received the same number of coins on the assumption that they were genuine.

[232] The Arabic word used here is *zuyūf,* which is the plural of *zayf,* and refers to coins that were rejected by the state treasury (*bayt al-māl*), due to a deficiency in their quality. The coins, however, were accepted by traders in the market. It may also refer to debased coins in which the content of the precious metal (gold or silver) was reduced. This is in contrast to *jiyād* coins which consisted of pure gold or silver and were accepted by the *bayt al-māl* as well as traders.

[233] Since he has received the full quantity of his debt, the debt is deemed settled as no consideration is given to quality when two usurious items of the same genus are set-off against each other. This is the logical application of the juristic principle

ومن رهن عبدين بألف درهم فقضى حصة أحدهما
لم يكن له أن يقبضه حتى يؤدي باقي الدين

If a person pledges two slaves (together) in lieu of (a debt of) one thousand dirhams and thereafter pays the portion of one of them he shall not have the right to take possession of him until he discharges the remainder of the debt.[234]

وإذا وكل الراهن المرتهن أو العدل أو غيرهما ببيع الرهن عند حلول الدين فالوكالة جائزة
فإن شرطت في عقد الرهن فليس للراهن عزله عنها فإن عزله لم ينعزل
وإن مات الراهن لم ينعزل

If the pledgor appoints the pledgee, the ʿ*adl*, or any other person as proxy to sell the pledge when the debt becomes due, such appointment shall be valid. If this is made a condition in the pledge contract, the pledgor may not dismiss the proxy. If he does so, the dismissal shall not take effect.[235] If the pledgor dies, the proxy shall not be dismissed.[236]

وللمرتهن أن يطالب الراهن بدينه ويحبسه به

The pledgee may claim his debt from the pledgor[237] and (seek to) detain him

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(*qiyās*) and was adopted by Imām Abū Ḥanīfa. Imām Abū Yūsuf and Imām Muḥammad, on the other hand, adopted the view stated in the text on the basis of juristic preference (*istiḥsān*) giving regard to providing an equitable solution to the matter at hand.

[234] The pledge (i.e. the two slaves together) was in lieu of the entire debt and therefore may be retained until the full debt is settled.

[235] Since this was made a condition within the pledge contract it becomes a binding term of the contract. Sanctioning the dismissal will infringe on this right of the pledgee to which he is entitled in terms of the pledge contract.

[236] The rules with respect to dismissal for this type of proxy, that is part of the pledge contract, differ from that of the ordinary proxy as discussed in the chapter on *wakāla,* in that the proxy (*wakīl*) here is not automatically dismissed upon the demise of the principal (*muwakkil*).

[237] When the debt becomes due the pledgee (creditor) shall have the right to claim

on account of it.[238]

وإن كان الرهن في يده فليس عليه أن يمكنه من بيعه حتى يقضيه الدين من ثمنه
فإن قضاه الدين قيل له سلم الرهن إليه

If the pledge is in his hand he shall not be obliged to allow the pledgor to sell it[239] so that he can pay him the debt from its proceeds. If he pays the debt the pledgee shall be ordered to hand over the pledge to the pledgor.

وإذا باع الراهن الرهن بغير إذن المرتهن فالبيع موقوف
فإن أجازه المرتهن جاز وإن قضاه الراهن دينه جاز البيع

If the pledgor sells the pledge without the permission of the pledgee the sale shall be pending.[240] If the pledgee approves the same it shall be valid.[241] If the pledgor pays him the debt, the sale shall become valid.[242]

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fulfilment thereof from the pledgor (debtor.) His holding the pledge does not preclude him from doing so, as the pledge is merely intended to secure the debt.

[238] If the debtor unduly delays making payment of the debt, despite having the means to do so, the pledgee creditor may apply to the authorities for him to be detained. This is in spite of his holding the pledge.

[239] It is the right of the pledgee to hold the pledge as security for payment of the debt. He is therefore under no obligation to enable the pledgor to sell the pledged item in order to pay off the debt from the amount realized through such sale. He may however do this of his own accord.

[240] Since the pledgee has the right to hold the item, the sale of the item shall not go through and shall remain *mawqūf* (pending) on the authorization of the pledgee. The purchaser, in such instance, has the option of waiting for the pledge to be released or to apply to court for annulment of the sale.

[241] In such a case the price realized from the sale shall become a pledge in place of the original item.

[242] Once the debt is settled there is no impediment for the sale to take effect and the sale shall become valid.

وإن أعتق الراهن عبد الرهن نفذ عتقه فإن كان الدين حالا طولب بأداء الدين
وإن كان مؤجلا أخذ منه قيمة العبد فجعلت رهنا مكانه حتى يحل الدين
وإن كان الراهن معسرا استسعى العبد في قيمته فقضى بها دينه وكذلك إذا استهلك
الراهن الرهن وإن استهلكه أجنبي فالمرتهن هو الخصم في تضمينه
ويأخذ القيمة فتكون رهنا في يده

If the pledgor emancipates the slave that is pledged, such emancipation shall be effective.[243] If the debt is due, payment of the debt shall be demanded from him.[244] If the debt is deferred, the value of the slave shall be taken from him and held as a pledge until the debt becomes due.[245] If the pledgor is hard-pressed, the slave shall be made to work for his value and the debt shall be paid thereby.[246] The same shall apply when the pledgor destroys the pledge. If a third party destroys the pledge, the pledgee shall be the applicant in claiming liability and he shall take the value which shall become a pledge in his hand.

[243] The pledgor is the owner of the slave and can therefore emancipate him. Unlike a sale, emancipation takes effect despite the slave's being pledged. Once the slave is free he obviously cannot be held as a pledge any longer.

[244] This applies when the pledgor is well-off and is able to settle the debt.

[245] Once the debt becomes due and payable the pledgee may collect the amount due to him from the amount held as a pledge and return the excess if any.

[246] If the pledgor (debtor), after having emancipated the pledged slave without the permission of the pledgee, is unable to fulfil the right of the pledgee (creditor), the pledgee shall be granted the right to claim his right from the earnings of the slave due to the slave's being the effective beneficiary of the emancipation i.e. the slave will be made to work for the benefit of the pledgee for the amount of the debt limited to the value of the slave. The slave shall be entitled thereafter to reclaim this amount from the actual debtor (i.e. the pledgor), once he is in a position to pay, since he was compelled to settle the debt which in reality was the obligation of the pledgor.

وجناية الراهن على الرهن مضمونة وجناية المرتهن عليه تسقط من دينه بقدرها
وجناية الرهن على الراهن وعلى المرتهن وعلى مالهما هدر

An offence[247] (committed) by the pledgor against the pledge shall incur liability.[248] An offence (committed) by the pledgee against the pledge shall result in a proportionate reduction of the debt.[249] An offence (committed) by the pledge against the pledgor,[250] the pledgee[251] and their wealth shall not incur any liability.[252]

وأجرة البيت الذي يحفظ فيه الرهن على المرتهن وأجرة الراعي ونفقة الرهن على الراهن
ونماؤه للراهن فيكون رهنا مع الأصل فإن هلك هلك بغير شيء
وإن هلك الأصل وبقي النماء افتكه الراهن بحصته
ويقسم الدين على قيمة الرهن يوم القبض وقيمة النماء يوم الفكاك
فما أصاب الأصل سقط من الدين وما أصاب النماء افتكه الراهن به

The rental for the place in which the pledge is stored shall be the obligation of the pledgee.[253] The wage of the shepherd and the expenses of the pledge

[247] *Jināya* (lit. crime or offence) refers to an infringement or offence against a person that makes retaliation or some other punishment mandatory. This may be a crime against the person's body and limbs e.g. a murder or wound. The details of such offences are discussed in the *Mukhtaṣar* in the chapter of *jināyāt*, which does not form part of this commentary.

[248] The right of the pledgee in the pledge arising from the pledge contract is given due regard and the pledgor shall be held liable for any loss of this right caused by him in spite of his being the actual owner of the pledged slave.

[249] The pledgee will be, in any event, liable for the pledged item and the amount of the liability shall be set off with the debt if of the same genus.

[250] There is no monetary liability for the offence of a slave against its owner.

[251] Since the offence was committed whilst the slave was in the hand of the pledgee the liability eventually devolves on him and is therefore nullified.

[252] The Arabic term used here is *hadr* (lit.for nothing, in vain - Hans Wehr)

[253] All expenses for the storage and safekeeping of the pledged item shall be the obligation of the pledgee as holder of the item.

shall be the obligation of the pledgor.[254] The growth[255] of the pledge shall belong to the pledgor and shall become a pledge together with the original (pledge.) If it is destroyed there shall be no liability.[256] If the original (pledge) is destroyed whilst the growth remains the pledgor shall redeem it in exchange for its portion.[257] The debt shall be divided into the value of the pledge on the date of possession and the value of the growth on the date of redemption. The portion of the debt for the original (pledge) shall fall away and the portion (of the debt) for the growth shall be redeemed by the pledgor for that amount.[258]

وتجوز الزيادة في الرهن ولا تجوز في الدين عند أبي حنيفة ومحمد
ولا يصير الرهن رهناً بهما وقال أبو يوسف تجوز الزيادة في الدين أيضا

An increase may be made to the pledge.[259] No increase may be made to the debt (amount) according to Imām Abū Ḥanīfa and Imām Muḥammad[260] and

[254] All expenses for the maintenance, preservation and sustenance of the pledged item shall be the obligation of the pledgor as owner of the item.

[255] 'Growth' refers to incidental gains in the form of the produce of the pledged item e.g. offspring, fruit, milk, wool etc.

[256] Since the growth was included as part of the pledge secondarily and was not included in the original pledge contract it is not deemed to be in lieu of the original debt and carries no intended value. The pledgee therefore bears no liability for it.

[257] Although the growth carries no intended value initially, it does so at the time of redemption.

[258] This is best illustrated by an example:
If we assume that the debt was twelve (12) dirhams, the value of the original pledge on the date of possession was ten (10) dirhams, and the value of the growth on the date of redemption was five (5) dirhams. The debt, therefore, will be divided into the proportion of 10:5 or 2:1 which means that the two thirds of the debt will be the portion of the debt against the original pledge i.e. eight (8) dirhams and one third of the debt will be the portion of the debt against the growth i.e. four (4) dirhams. The pledgor shall therefore redeem the growth for four (4) dirhams.

[259] For example, if the pledgor pledges a garment in lieu of a debt of ten (10) dirhams, he may later pledge an additional garment in lieu of the same debt.

[260] For example, if the pledgee requests for an additional amount as a loan with the

the pledge shall not become a pledge for both (amounts.)[261] Imām Abū Yūsuf is of the view that an increase may be made to the debt as well.

وإذا رهن عينا واحدة عند رجلين بدين لكل واحد منهما جاز
وجميعها رهن عند كل واحد منهما والمضمون على كل واحد منهما حصة دينه منها
فإن قضى أحدهما دينه كانت كلها رهنا في يد الآخر حتى يستوفي دينه

A person may pledge one article with two people in lieu of a debt (due) to each one of them and the entire article shall be a pledge with each one of them.[262] Each of them shall be liable for the portion of his debt in the article. If he settles the debt of one of them the entire article shall be a pledge in the hand of the other until he receives (fulfilment) his debt.

ومن باع عبدا على أن يرهنه المشتري بالثمن شيئا بعينه فإن امتنع المشتري من تسليم
الرهن لم يجبر عليه وكان البائع بالخيار إن شاء رضي بترك الرهن وإن شاء فسخ البيع
إلا أن يدفع المشتري الثمن حالا أو يدفع قيمة الرهن رهنا مكانه

If a person sells a slave with the provision[263] that the purchaser pledges a

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agreement that the original pledge, which was for the original debt of ten dirhams, will be pledged for this additional amount as well i.e. a total of fifteen dirhams, this shall be void and shall not apply to the original pledge contract.

[261] This refers to the original debt and the new debt. The pledge will remain as a pledge for only the original debt and once this is settled the pledge may be redeemed.

[262] Since the pledge contract was concluded in one transaction the entire article becomes a pledge with each one of the two creditors and each one of them will have the right to withhold the entire item as security for the fulfilment of his debt. If the item cannot be divided they may agree to take turns in keeping it. If it is possible to split the item each of them must keep half of it. This rule is based on the analogy with the case of an item deposited for safekeeping as appears later in the chapter on *wadīʿa*.

[263] The sale shall be valid since the provision is in conformity with the requirements of the contract i.e. the pledge secures payment of the purchase price which is an obligation of the contract of sale.

certain item[264] with him in lieu of the price, and the purchaser thereafter refuses to hand over the pledge, he shall not be compelled to do so.[265] The seller shall have the option of either agreeing to forsake the pledge or cancelling the sale, unless the purchaser pays the price immediately or gives the value of the pledge as a pledge in place of it.

وللمرتهن أن يحفظ الرهن بنفسه وزوجته وولده وخادمه الذي في عياله
وإن حفظه بغير من في عياله أو أودعه ضمن

The pledgee may keep the pledge himself or (store it with) his wife, child[266] or servant who are his dependents.[267] If he stores it with anyone that is not his dependant or deposits it (for safekeeping with someone else) he shall be liable.[268]

وإذا تعدى المرتهن في الرهن ضمنه ضمان الغصب بجميع قيمته

If the pledgee is guilty of misconduct in relation to the pledge he shall be liable with the same liability as that of usurpation (*ghaṣb*) for its full value.[269]

وإذا أعار المرتهن الرهن للراهن فقبضه خرج من ضمان المرتهن فإن هلك في يد الراهن
هلك بغير شيء وللمرتهن أن يسترجعه إلى يده فإذا أخذه عاد الضمان

If the pledgee lends the pledge to the pledgor and he takes possession of the

[264] The item to be given as a pledge must be specified otherwise the sale will be rendered invalid.
[265] As discussed, the pledge only becomes complete and binding when possession is taken. Since possession has not been taken the pledgor cannot be compelled to go through with the pledge.
[266] This refers to an adult child that lives with him as opposed to one that does not.
[267] A person normally stores his own items or any other items that are kept with him for safekeeping in this way and therefore the same applies to the pledged item.
[268] Such an action will constitute *taʿaddī* (misconduct) and will result in liability.
[269] The pledgee shall be liable for the full value of the item irrespective of the amount of the debt because by committing misconduct he is deemed to be a usurper.

same, it shall no longer be the risk of the pledgee.[270] If it is destroyed in the hand of the pledgor there shall be no liability.[271] The pledgee may recall it to his possession and when he takes it the risk shall return.

وإذا مات الراهن باع وصيه الرهن وقضى الدين
فإن لم يكن له وصي نصب القاضي له وصيا وأمره ببيعه

If the pledgor passes away his executor shall sell the pledge and settle the debt. If he has no executor the judge shall appoint[272] an executor for him and order him to sell the pledge.

[270] By the pledgee's handing it back to the pledgor the possession of the pledgee, which originally gave rise to his liability for the item, is withdrawn and the liability is terminated.

[271] Since the item was destroyed in the hand of the owner there is no liability on anyone.

[272] In principle, the judge (court) is appointed to look after the rights of Muslims when they are unable to do so themselves. In this instance looking after the rights of the person requires that an executor be appointed to discharge his debts and collect his dues.

كتاب الحجر
Chapter: *Ḥajr* (Interdiction)

الأسباب الموجبة للحجر ثلاثة الصغر والرق والجنون
ولا يجوز تصرف الصغير إلا بإذن وليه ولا تصرف العبد إلا بإذن سيده
ولا يجوز تصرف المجنون المغلوب على عقله بحال

The causes that necessitate interdiction are three: minority,[273] slavery[274] and insanity.[275] The transaction of a minor shall not be valid unless with the authorization of his guardian.[276] The transaction of a slave shall not be valid unless with the authorization of his master. The transaction of a permanently[277] insane person shall not be valid under any circumstance.

ومن باع من هؤلاء شيئا أو اشتراه وهو يعقل البيع ويقصده
فالولي بالخيار إن شاء أجازه إذا كان فيه مصلحة وإن شاء فسخه

If any of these persons sells or purchases anything, whilst understanding sale[278] and intending it[279] the guardian shall have the option of (either)

[273] Since the intellect of a minor is either absent or deficient he is interdicted in order to protect his own interests.
[274] Although a slave is eligible to enter into a contract, as there is no deficiency in his intellect, he is interdicted in order to protect the interests of his master.
[275] Interdiction on an insane person is in consideration of his best interests due to the absence of or deficiency in intellect.
[276] This refers to a discerning minor i.e. a minor who understands the consequences of a sale transaction. The transaction of a non-discerning minor is not valid under any circumstance.
[277] If the person is not permanently insane but regains his sanity at times then the same law as that of a discerning minor applies to him.
[278] This means that they understand the consequences of a sale transaction in terms of the transfer of ownership by the seller's losing ownership of the item of sale and

approving the transaction, if (he deems that) there is benefit in it, or cancelling it.

وهذه المعاني الثلاثة توجب الحجر في الأقوال دون الأفعال
فالصبي والمجنون لا تصح عقودهما ولا إقرارهما ولا يقع طلاقهما ولا عتاقهما
وإن أتلفا شيئا لزمهما ضمانه

These three factors shall necessitate interdiction in statements only and not actions.[280] Hence, the contracts and acknowledgements of a minor or insane person shall not be valid and their (pronouncement of) divorce or emancipation shall not occur. However if they destroy something they shall be liable for the same.

وأما العبد فأقواله نافذة في حق نفسه غير نافذة في حق مولاه
فإن أقر بمال لزمه بعد الحرية ولم يلزمه في الحال
وإن أقر بحد أو قصاص لزمه في الحال وينفذ طلاقه

The statements of a slave shall be effective with respect to himself but not with respect to his master. If he makes an acknowledgement of debt he shall be liable for the same after he becomes free and shall not be liable immediately.[281] If he makes an acknowledgement of a legal punishment (*ḥadd*) or retaliatory punishment (*qiṣāṣ*) he shall be liable immediately.[282] His (pronouncement of) divorce shall be effective.[283]

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the purchaser's acquiring ownership thereof.

[279] In other words, the sale transaction is genuinely entered into and is not done in jest.

[280] Actions cannot be undone once they take place since they occur physically and they therefore cannot be interdicted. On the other hand, legal statements are only deemed effective if recognized by the law (Sharīʿa) and it is therefore possible to interdict them when there is a flaw with respect to purposeful intent as in the case of a person with deficient intellect.

[281] This is done in order to protect the interests of the master.

[282] With respect to his life the slave is deemed to still possess the default freedom

وقال أبو حنيفة لا يحجر على السفيه إذا كان بالغا عاقلا حرا وتصرفه في ماله جائز
وإن كان مبذرا مفسدا يتلف ماله فيما لا غرض له فيه ولا مصلحة إلا أنه قال
إذا بلغ الغلام غير رشيد لم يسلم إليه ماله حتى يبلغ خمسا وعشرين سنة
فإن تصرف فيه قبل ذلك نفذ تصرفه فإذا بلغ خمسا وعشرين سنة سلم إليه ماله
وإن لم يؤنس منه الرشد

According to Imām Abū Ḥanīfa no interdiction shall be placed on a fool[284] if he is major, sane and free[285] and his transactions in his wealth shall be valid even though he squanders and destroys his wealth in aimless and useless avenues. However Imām Abū Ḥanīfa is of the view that if a boy reaches maturity but is still not (deemed) sensible[286] his wealth shall not be handed to him until he reaches the age of twenty five. Any transactions he does prior to this shall (nevertheless) take effect. Once he reaches the age of twenty five his wealth shall be handed to him even though he is not deemed to be sensible.[287]

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inherent in human beings. For this reason the master cannot make an acknowledgement of a capital offence on behalf of his slave. Hence any acknowledgement the slave makes in this regard is effective immediately.

[283] This does not affect the right of the master and is therefore effective.

[284] A fool (*safīh*) refers to a person who is so feeble-minded that he cannot look after his wealth and who squanders and exhausts it in aimless and useless avenues even though he is deemed to possess sanity i.e. he is not classified as insane. According to the view of Imām Abū Ḥanīfa more harm is caused by interdicting such a person as this entails extinguishing his right as a human being to do transactions.

[285] In other words, none of the factors that necessitate interdiction are found in him.

[286] The Arabic word '*rushd*' refers to sensibility especially in the economic sense.

[287] The reason his wealth was withheld from him after he reached maturity was to allow him a period of time to learn how to manage his wealth as an adult. This cannot continue indefinitely and the limit set by Imām Abū Ḥanīfa is the age of twenty five, which, theoretically, is the age at which a man can become a grandfather!

وقال أبو يوسف ومحمد يحجر على السفيه ويمنع من التصرف في ماله
فإن باع لم ينفذ بيعه فإن كان فيه مصلحة أجازه الحاكم وإن أعتق عبدا نفذ عتقه
وكان على العبد أن يسعى في قيمته وإن تزوج امرأة جاز نكاحه فإن سمى لها مهرا
جاز منه مقدار مهر مثلها وبطل الفضل وقالا فيمن بلغ غير رشيد لا يدفع إليه ماله أبدا
حتى يؤنس منه الرشد ولا يجوز تصرفه فيه

According to Imām Abū Yūsuf and Imām Muḥammad an interdict shall be placed on a fool[288] and he shall be barred from transacting in his wealth. Any sale transaction he enters into shall not take effect. The judge (court) may allow such sale if it is deemed to be in his best interests. If he emancipates a slave the emancipation shall take effect[289] and the slave shall have to work up to his value.[290] If he marries a woman the marriage shall be valid[291] and the dowry he fixes shall be valid only up to the value of the standard dowry (*mahr al-mithl*) and any excess shall be void.

According to them,[292] when a boy reaches maturity but is still not (deemed) sensible, his wealth shall not be given to him for as long as he is not deemed sensible[293] and any transaction he does in such wealth shall not be valid.[294]

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[288] This interdiction is in order to protect his interests and the law may allow transactions that are deemed to be in his best interests.

[289] Imām Abū Yūsuf and Imām Muḥammad apply the principle that any transaction in which jest (*hazl*) has an effect interdiction shall also have an effect in such transactions and vice versa. Emancipation is an action in which jest has no effect and the same will apply for interdiction.

[290] Since it is not possible to rescind the emancipation, the only recourse to secure his interests is for the slave, the beneficiary of the emancipation, to work and pay off his value with the earnings.

[291] Interdiction does not have any effect on the invalidity of the marriage contract just as jest does not. In addition, since marriage is a basic need for a man, this transaction is considered valid.

[292] This refers to Imām Abū Yūsuf and Imām Muḥammad.

[293] This will apply even after he reaches the age of twenty five.

[294] According to Imām Abū Yūsuf and Imām Muḥammad, the benefit of withholding his wealth is only realized by also disallowing any transaction he enters into. If this is not done, he will still be able to dispose of his assets through the transactions that

وتخرج الزكاة من مال السفيه وينفق منه على أولاده وزوجته ومن تجب نفقته عليه
من ذوي أرحامه فإن أراد حجة الإسلام لم يمنع منها ولا يسلم القاضي النفقة إليه
ويسلمها إلى ثقة من الحاج ينفقها عليه في طريق الحج
فإن مرض وأوصى بوصايا في القرب وأبواب الخير جاز ذلك في ثلث ماله

Zakāh as well as maintenance for his children, wife and those of his relatives who is required to maintain shall be paid from the wealth of the fool.[295] If he wishes to perform the obligatory pilgrimage (*ḥajj*) he shall be permitted to do so. However the judge shall not hand the expenditure to him but (shall hand it) to some other reliable person that is also going on pilgrimage to spend on him during the journey. If he becomes ill and makes charitable bequests, these shall be valid[296] up to (the value of) one third of his (total) wealth.

وبلوغ الغلام بالاحتلام والإحبال والإنزال إذا وطئ فإن لم يوجد ذلك فحتى يتم له
ثماني عشرة سنة عند أبي حنيفة وبلوغ الجارية بالحيض والاحتلام والحبل فإن لم يوجد
ذلك فحتى يتم لها سبع عشرة سنة وقال أبو يوسف ومحمد إذا تم للغلام والجارية
خمس عشرة سنة فقد بلغا وإذا راهق الغلام والجارية وأشكل أمرهما في البلوغ
وقالا قد بلغنا فالقول قولهما وأحكامهما أحكام البالغين

The maturity of a boy shall be (established) by nocturnal emission (of semen)[297], impregnation or ejaculation during intercourse. If none of these signs are found then (he shall be deemed to be mature) once he reaches the

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he enters into even though he does not have physical possession of such assets.

[295] These are basic necessities as well as religious obligations which he is obliged to discharge despite being a fool. In the case of *zakāh* the money will have to be given to him to discharge to the deserving recipients under supervision, so as to secure his intention which is a requirement for the validity of the religious obligation of *zakāh.*

[296] It is in his best interests in the hereafter for his charitable bequests at the time of his passing away to be deemed valid.

[297] i.e. by means of a wet dream whilst asleep.

age of eighteen years according to Imām Abū Ḥanīfa. The maturity of a girl shall be (established) by menstruation, nocturnal emission (of semen) and pregnancy. If none of these signs are found then (she shall be deemed to be mature) once she reaches the age of seventeen years. According to Imām Abū Yūsuf and Imām Muḥammad, if a boy or girl reaches the age of fifteen years they shall be (deemed to be) mature.[298] When a boy or girl reaches the age of puberty[299] and the matter of their maturity is unclear their statement with respect to their having attained maturity shall be accepted and the laws that apply to adults shall apply to them.

وقال أبو حنيفة لا أحجر في الدين وإذا وجبت الديون على رجل وطلب غرماؤه
حبسه والحجر عليه لم أحجر عليه وإن كان له مال لم يتصرف فيه الحاكم
ولكن يحبسه أبدا حتى يبيعه في دينه فإن كان له دراهم ودينه دراهم قضاها القاضي
بغير أمره وإن كان دينه دراهم وله دنانير باعها القاضي في دينه

According to Imām Abū Ḥanīfa there is no interdiction in respect of debt.[300] If a person's debts become due and his creditors demand that he be detained and interdicted he shall not be interdicted according to Imām Abū Ḥanīfa. If he has wealth[301] the judge (court) shall not transact in such wealth but shall detain him indefinitely until he sells the same to pay off his debt. If he has dirhams and his debt is also dirhams the judge may settle the debt without his permission.[302] If the debt is dirhams and he has dīnārs the judge may sell them[303] to pay off the debt.

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[298] This is the view on which *fatwā* is given in the Ḥanafī school.

[299] This is at least twelve years for a boy and nine years for a girl.

[300] This refers to an insolvent person (*muflis*) whose liabilities are greater than his assets.

[301] Wealth here refers to assets besides dirhams and dīnārs as is clear from the next sentence.

[302] A creditor is allowed to appropriate the wealth of a debtor that he comes across if it is of the same genus as that of the debt e.g. dirhams. Thus the judge may also pay off the debt to the creditor.

[303] Dirhams and dīnārs are deemed to be of the same genus having regard to their being media of exchange (*thaman*.)

وقال أبو يوسف ومحمد إذا طلب غرماء المفلس الحجر عليه حجر القاضي عليه
ومنعه من البيع والتصرف والإقرار حتى لا يضر بالغرماء
وباع ماله إن امتنع من بيعه وقسمه بين غرمائه بالحصص

According to Imām Abū Yūsuf and Imām Muḥammad, if the creditors of an insolvent person demand that he be interdicted the judge shall place an interdict on him and prevent him from entering into any sale[304] or other transaction and making any acknowledgements so as not to prejudice the (rights of his) creditors. The judge may also sell the assets of the insolvent person if he refuses to do so and distribute the proceeds of the sale to the creditors proportionately.

فإن أقر في حال الحجر بإقرار لزمه ذلك بعد قضاء الديون

If he makes an acknowledgement (of a debt or right) whilst under interdiction, he shall be liable for the same after settling the (existing) debts.

وينفق على المفلس من ماله وعلى زوجته وأولاده الصغار وذوي أرحامه

Maintenance for the insolvent person, his wife, children and relatives shall be paid from his wealth.[305]

وإن لم يعرف للمفلس مال وطلب غرماؤه حبسه وهو يقول لا مال لي
حبسه الحاكم في كل دين التزمه بدلا عن مال حصل يده كثمن مبيع وبدل القرض
وفي كل دين التزمه بعقد كالمهر والكفالة ولم يحبسه فيما سوى ذلك
كعوض المغصوب وأرش الجنايات إلا أن تقوم البينة أن له مالا

If the insolvent person has no known wealth and his creditors demand that he be detained whilst he claims that he has no wealth, the court shall detain him for any debt that he became liable for in exchange for wealth that he

[304] This refers to the sale of an asset for less than its market value.
[305] These are basic necessities and are given preference over the creditors' dues.

received,[306] such as the price of an item of sale or a loan, as well as for any debt that he became liable for by (entering into) a contract,[307] such as dowry and suretyship. The court shall not detain him for any other debt, such as compensation for a usurped item or an offence, unless there is evidence that (proves) he has wealth.[308]

وإذا حبسه القاضي شهرين أو ثلاثة سأل القاضي عن حاله
فإن لم ينكشف له مال خلى سبيله وكذلك إذا أقام البينة أنه لا مال له

Once the judge detains him for two or three months, he shall conduct an inquiry regarding his status. If no wealth of the insolvent person is discovered, the judge shall release him. The same applies if evidence that he has no wealth is established.[309]

ولا يحول بينه وبين غرمائه بعد خروجه من الحبس
ويلازمونه ولا يمنعونه من التصرف والسفر ويأخذون فضل كسبه فيقسم بينهم بالحصص
وقال أبو يوسف ومحمد إذا فلسه الحاكم حال بينه وبين غرمائه
إلا أن يقيموا البينة أنه قد حصل له مال

The judge shall not intervene between the insolvent person and his creditors after his release from detention and they may pursue[310] him

[306] The receipt of wealth is indicative of his being in possession of the same currently and his failure to settle his debts is deemed to be oppression (*ẓulm*.) In order to eliminate such oppression he is detained so as to pressurize him into settling his debts from the wealth he is presumed to have.

[307] The act of entering into a contract that gives rise to a financial obligation is indicative of his being in possession of wealth.

[308] In the absence of any evidence or indication that he has wealth it is assumed by default that he has no wealth and therefore deserves respite as per the Qurʾānic directive. He therefore may not be detained.

[309] Once it is established or reasonably presumed that he has no wealth there is no basis for detaining him any longer.

[310] *Mulāzama* refers to the harassment of a recalcitrant debtor through the constant pursuit of him.

without preventing him from concluding transactions or travelling. They may take the surplus of his earnings which shall be distributed amongst them proportionately. According to Imām Abū Yūsuf and Imām Muḥammad, when the court declares him insolvent it shall intervene between him and his creditors[311] unless they establish evidence that he has obtained some wealth.

ولا يحجر على الفاسق إذا كان مصلحا لماله والفسق الأصلي والطاريء سواء

There shall be no interdiction on a sinner[312] if he is able to look after his wealth. The same law shall apply whether the person was a sinner originally (from the age of maturity) or became a sinner later on.

ومن أفلس وعنده متاع لرجل بعينه ابتاعه منه فصاحب المتاع أسوة الغرماء فيه

If a person becomes insolvent whilst he has with him the goods of a specific person, which he had purchased, the (original) owner (i.e. the seller) of such goods shall rank equal to the (other) creditors with respect to them.[313]

[311] According to Imām Abū Yūsuf and Imām Muḥammad a judgement of insolvency is valid and the insolvent person is entitled to reprieve. Imām Abū Ḥanīfa, on the other hand, does not regard a judgment of insolvency to be valid.

[312] The purpose of interdiction is to protect the interests of the person who is not able to look after his own wealth. The sinner is deemed to possess this ability.

[313] Since the sale has already taken place, the insolvent person has become the owner of the goods and the seller is entitled to the purchase price which is now a debt payable by the purchaser. It is therefore similar to all other obligations that he is liable for.

كتاب الإقرار
Chapter: *Iqrār* (Acknowledgement)

إذا أقر الحر البالغ العاقل بحق لزمه إقراره مجهولا كان ما أقر به أو معلوما
ويقال له بين المجهول

When a free, sane adult[314] makes an acknowledgement of a right he shall be liable for the same whether what he acknowledged was ambiguous[315] or known and he shall be asked to clarify[316] the ambiguous.

فإن قال لفلان على شيء لزمه أن يبين ماله قيمة
والقول فيه قوله مع يمينه إن ادعى المقر له أكثر من ذلك

Thus, if a person says[317], 'I owe so-and-so something' he must describe something of value[318] and his statement shall be accepted with his oath if the beneficiary of the acknowledgement claims more than that.

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[314] As discussed in the chapter on interdiction, the statements of a minor or insane person are not valid and the statements of a slave are only effective with respect to himself such that it does not affect the right of his master.

[315] Ambiguity will not render an acknowledgement invalid as it is possible that the person making the acknowledgement is unaware of the amount he owes at the time of the acknowledgement e.g. a person does not know the value of the article he damaged or the outstanding balance of an account that he owes.

[316] For the purposes of fulfilment the ambiguity will have to be removed and the judge will compel him to do so.

[317] It must be noted that many of the rules in this chapter are based on the usage of words in the Arabic language and the custom prevalent at the time of the author. Acknowledgements made in English will therefore depend a lot on how words are used in the English language and the meanings they convey in accordance with their customary usage.

[318] Since he acknowledged that he 'owes' something, it has to be something of value as an item that has no value cannot be owed.

وإذا قال له على مال فالمرجع في بيانه إليه ويقبل قوله في القليل والكثير
فإن قال له علي مال عظيم لم يصدق في أقل من مائتي درهم وإن قال دراهم كثيرة
لم يصدق في أقل من عشرة دراهم وإن قال دراهم فهي ثلاثة إلا أن يبين أكثر منها
وإن قال له علي كذا كذا درهما لم يصدق في أقل من أحد عشر درهما
وإن قال كذا وكذا درهما لم يصدق في أقل من أحد وعشرين درهما

If a person says 'I owe him wealth' then shall have to clarify what he means and his statement shall be accepted regardless of how much or how little the amount is.[319] If he says, 'great wealth' his statement shall not be accepted for (any amount) less than two hundred dirhams.[320] If he says, 'many dirhams[321]' his statement shall not be accepted for (any amount) less than ten dirhams. If he says, 'dirhams' his statement shall not be accepted for (any amount) less than three dirhams. If he says, 'such such dirhams' his statement shall not be accepted for (any amount) less than eleven dirhams. If he says, 'such and such dirhams' his statement shall not be accepted for (any amount) less than twenty one dirhams.[322]

وإن قال له علي أو قبلي فقد أقر بدين وإن قال عندي أو معي فهو إقرار بأمانة في يده

If a person says 'on me[323]' or 'towards me' he has acknowledged a debt. If he says 'by me' or 'with me' it shall be an acknowledgement of a trust in his

[319] His statement shall be accepted as long as it fits under the definition of 'wealth' and is known as such as per customary usage of the word.

[320] The Sharīʿa has deemed a person who possesses this amount to be rich and has made *zakāh* obligatory on him. This is therefore regarded to be a considerable amount.

[321] The Arabic word '*darāhim*' is the plural of the word dirham and refers to three to ten dirhams. Since he added the word 'many', ten is deemed to be the minimum in this case.

[322] These phrases are based on the method of usage of numbers in the Arabic language and altogether differ from their usage in English.

[323] As stated previously these rules depend on the usage of such prepositions in the Arabic language and the meaning they convey in terms of language and common usage.

hand.

وإن قال له رجل لي عليك ألف فقال اتزنها أو انتقدها أو أجلني بها أو قد قضيتكها فهو إقرار

If a person says to him, 'You owe me a thousand,' and he replies, 'Weigh it,' 'Take the cash for it,' 'Allow me to defer it' or 'I have already settled it with you,' this shall be an acknowledgement.[324]

ومن أقر بدين مؤجل فصدقه المقر له في الدين وكذبه في التأجيل لزمه الدين حالا ويستحلف المقر له في الأجل

If a person makes an acknowledgement of a deferred debt and the beneficiary of such acknowledgement confirms the debt but rejects the deferment, he shall be liable for the debt immediately and the beneficiary shall be requested to swear an oath[325] with respect to the deferment.

ومن أقر واستثنى متصلا بإقراره صح الاستثناء ولزمه الباقي سواء استثنى الأقل أو الأكثر فإن استثنى الجميع لزمه الإقرار وبطل الاستثناء وإن قال له علي مائة درهم إلا دينار أو إلا قفيز حنطة لزمه مائة درهم إلا قيمة الدينار أو القفيز

If a person makes an acknowledgement with an exclusion, the exclusion shall be valid and he shall be liable for the balance - whether he excluded the lesser or greater amount.[326] If he excludes the entire amount he shall be liable for the acknowledgement (in full) and the exclusion shall be void.[327] If

[324] Although he didn't make the acknowledgement of debt explicitly he confirmed it by making reference to it in his reply.

[325] Since he is denying the right of deferment claimed by the person making the acknowledgement he will be requested to take an oath in this regard.

[326] E.g. A person makes an acknowledgement of a 'hundred dirhams less ten' or a 'hundred dirhams less ninety.' As long as the exclusion is made with the acknowledgement it shall be valid. Exclusions that are made after the acknowledgement are not valid.

[327] Exclusion of the entire amount (e.g. 'a hundred dirhams less one hundred') is

a person says, 'I owe him one hundred dirhams except one dīnār' or '(except) one *qafīz* of wheat' he shall be liable for one hundred dirhams less the value of a dīnār or a *qafīz* of wheat.

وإن قال له علي مائة ودرهم فالمائة كلها دراهم وإن قال له علي مائة وثوب لزمه ثوب واحد والمرجع في تفسير المائة إليه

If a person says, 'I owe him one hundred and one dirham' then the entire hundred shall (also) be dirhams.[328] If he says, 'I owe him one hundred and one garment' he shall be liable for one garment and shall be requested to clarify what he meant by 'hundred.'[329]

ومن أقر بحق وقال إن شاء الله متصلا بإقراره لم يلزمه الإقرار

If a person acknowledges a right and together with that he says, 'If Allah wills' he shall not be liable[330] for the acknowledgement.

ومن أقر وشرط الخيار لزمه الإقرار وبطل الخيار

If a person makes an acknowledgement and stipulates the option (of rescinding) he shall be liable for the acknowledgement and the option shall be void.[331]

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tantamount to a retraction of the acknowledgement and is not valid.

[328] Although he did not mention that the 'hundred' referred to dirhams we will presume it to be such based on the common usage of the term. People commonly omitted the words dirhams, dīnārs and other measures of weight or volume when they recurred in a sentence due to the frequency of use.

[329] Since this phrase is not commonly used in the case of garments we cannot apply the above in this case and he will have to explain his intention.

[330] By him saying, 'If Allah wills,' he has suspended the effect of the acknowledgement on the will of Allah. This is a condition the realization of which we will not be able to ascertain and it therefore renders the acknowledgement void.

[331] An acknowledgement cannot be retracted or cancelled, once it is made and the stipulation of such an option does not have any effect.

ومن أقر بدار واستثنى بناءها لنفسه فللمقر له الدار والبناء
وإن قال بناء هذه الدار لي والعرصة لفلان فهو كما قال

If a person makes an acknowledgement of a property and excludes the building, the beneficiary of the acknowledgement shall receive the building as well as the property.[332] If a person says, 'The building on this property is mine and the land[333] is so-and-so's' it shall be as he said.

من أقر بتمر في قوصرة لزمه التمر والقوصرة ومن أقر بدابة في إصطبل لزمه الدابة خاصة
وإن قال غصبت ثوبا في منديل لزماه جميعا وإن قال له علي ثوب في ثوب لزماه
وإن قال له علي ثوب في عشرة أثواب لم يلزمه عند أبي حنيفة وأبي يوسف إلا ثوب واحد
وقال محمد يلزمه أحد عشر ثوبا

If a person makes an acknowledgement[334] of dates in a basket, he shall be liable for the dates as well as the basket.[335] If a person makes an acknowledgement of an animal in a stable he shall be liable for the animal only.[336] If a person says, 'I usurped a garment inside a (piece of) cloth,' he shall be liable for both together. If he says, 'I owe him one cloth within another,' he shall be liable for both. If he says, 'I owe him one cloth within ten cloths,' he shall be liable for only one cloth according to Imām Abū Ḥanīfa and Imām Abū Yūsuf.[337] According to Imām Muḥammad, he shall be

[332] The use of the exceptive form (*istithnāʾ*) in the Arabic language only applies to what is included in the text explicitly. The word *dār* (property) linguistically does not include the *bināʾ* (building) and hence such exclusion is not valid.

[333] The Arabic word used is *ʿarṣa* which refers to the piece of ground only without the building.

[334] In other words he acknowledges that he usurped these things.

[335] Since he acknowledged that he usurped the dates as well as the container (basket) he shall be liable for both.

[336] This is because usurpation (*ghaṣb*) cannot take place in immovable property and therefore there is no liability for it - as will be discussed in the chapter on usurpation.

[337] In normal practice a cloth is not wrapped in ten cloths and they are therefore not deemed to be a receptacle for the one cloth.

liable for eleven cloths.[338]

ومن أقر بغصب ثوب وجاء بثوب معيب فالقول قوله مع يمينه
وكذلك لو أقر بدراهم وقال هي زيوف

If a person makes an acknowledgement of having usurped a cloth and thereafter brings a flawed cloth, his statement shall be accepted together with his oath.[339] The same shall apply if he makes an acknowledgement of dirhams and thereafter says that they were *zuyūf.*[340]

وإن قال له علي خمسة في خمسة يريد الضرب والحساب لزمه خمسة واحدة
وإن قال أردت خمسة مع خمسة لزمه عشرة وإن قال له علي من درهم إلى عشرة
لزمه تسعة عند أبي حنيفة فيلزمه الابتداء وما بعده وتسقط الغاية
وقال أبو يوسف ومحمد يلزمه العشرة كلها

If a person says, 'I owe him five in five,' intending multiplication and calculation, he shall be liable for only one five.[341] If he says, 'I intended five with five,' he shall be liable for ten.[342] If he says, 'I owe him from one dirham to ten,' he shall be liable for nine according to Imām Abū Ḥanīfa, being liable

[338] Imām Muḥammad, however, regards the ten cloths to be a receptacle for the one as this can possibly occur in the case of an extremely valuable cloth.

[339] Usurpation (*ghaṣb*) does not necessitate that the usurped item be free of defects because a person generally usurps any item he finds, whether it has a defect or not. Thus the default assumption is not that the item is free of defects as opposed to the case in a sale contract.

[340] Refer to the definition of *zuyūf* as discussed in the chapter on *rahn.*

[341] It appears that the concept of multiplication (*ḍarb*) as understood by the earlier jurists differed from how we understand it today. Whilst we understand multiplication to be basically a form of repeated addition (1 x 3 is actually 1 + 1 + 1 resulting in 3 items) it was understood by the jurists to be an increase in the number of parts (1 x 3 is actually splitting one item into 3 parts without an increase in the number of items.)

[342] Since the Arabic preposition *fī* could also be used to mean 'with' this meaning can be taken if he intends this instead of the meaning of addition.

for the starting point up to and excluding the end point. According to Imāms Abū Yūsuf and Muḥammad he shall be liable for the entire ten.

وإذا قال له علي ألف درهم من ثمن عبد اشتريته منه ولم أقبضه فإن ذكر عبدا بعينه
قيل للمقر له إن شئت فسلم العبد وخذ الألف وإلا فلا شيء لك
وإن قال له علي ألف من ثمن عبد ولم يعينه لزمه الألف في قول أبي حنيفة
ولو قال له علي ألف من ثمن هذا العبد لم يلزمه حتى يسلم العبد
فإن سلم العبد لزمه الألف وإن لم يسلمه لم تلزمه

If he says, 'I owe him one thousand dirhams being the price of a slave which I purchased from him and which I did not take possession of,' and he mentions a specific slave, the beneficiary of the acknowledgement shall be told, 'If you wish, hand over the slave and take the one thousand.[343] If not, you are not entitled to anything.' If he says, 'I owe him one thousand being the price of a slave,' but he does not identify the slave, he shall be liable for the one thousand according to Imām Abū Ḥanīfa.[344] If he says, 'I owe him one thousand being the price of this slave,' he shall not be liable for it until the slave is handed over to him. Once the slave is handed over to him he shall be liable for the one thousand and if he is not handed over to him he shall not be liable for the same.

ولو قال له علي ألف من ثمن خمر أو خنزير لزمه الألف ولم يقبل تفسيره

If he says, 'I owe him one thousand dirhams being the price of wine or a pig,' he shall be liable for the one thousand and his explanation shall not be accepted.[345]

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[343] If he chooses this option a sale will be deemed to come into effect on the basis of their concurrence (*taṣāduq.*)

[344] Imām Abū Ḥanīfa regards this to be a retraction which is not permitted in acknowledgements.

[345] Since the last part of his statement negates the obligation established by the first part, he will not be permitted to make such a retraction according to Imām Abū Ḥanīfa.

ولو قال له علي ألف من ثمن متاع وهي زيوف
وقال المقر له جياد لزمه الجياد في قول أبي حنيفة

If he says, 'I owe him one thousand dirhams being the price of goods and they are *zuyūf* (dirhams,)' but the acknowledgee says, '(they were) *jiyād* (dirhams[346])' he shall be liable for *jiyād*' dirhams[347] according to Imām Abū Ḥanīfa.

ومن أقر لغيره بخاتم فله الحلقة والفص
وإن أقر له بسيف فله النصل والجفن والحمائل
وإن أقر بحجلة فله العيدان والكسوة

If a person makes an acknowledgement of a ring in someone's favour, he shall be entitled to the band and the stone.[348] If he makes an acknowledgement of a sword for someone, he shall be entitled to the blade, the sheath and the belt. If he makes an acknowledgement of a canopy,[349] he shall be entitled to the wooden sticks and the cloth (cover.)

وإن قال لحمل فلانة علي ألف فإن قال أوصى به له فلان أو مات أبوه فورثه
فالإقرار صحيح وإن أبهم الإقرار لم يصح عند أبي يوسف

If he says, 'I owe the unborn child of so and so one thousand,' and he says, 'So and so had bequeathed this amount to that child,' or, 'The father of the child had passed away and that is the inheritance,' then such acknowledgement shall be valid.[350] If he leaves the acknowledgement

[346] Refer to the definition of *jiyād* and *zuyūf* as discussed in the chapter on *rahn.*
[347] A sale, unlike the case of usurpation discussed earlier, demands that the item of sale and the purchase price be free of defect. Thus the second part of his statement, in which he claims the dirhams to be defective, is an attempt to retract from the first part and will not be accepted unless the acknowledgee concurs with him.
[348] The Arabic word *khātam* (ring) includes both these things.
[349] The Arabic word *ḥajala* refers to a curtained canopy or alcove made for a bride.
[350] In other words, if he provides a plausible explanation as to how he is liable to the child, the acknowledgement shall be deemed valid. If not, the acknowledgement

vague[351] it shall not be valid according to Imām Abū Yūsuf.

وإذا أقر بحمل جارية أو حمل شاة لرجل صح الإقرار ولزمه

If he makes an acknowledgement of the unborn child of a slave-girl or the unborn offspring of a sheep for a certain person, the acknowledgement shall be valid and he shall be liable for the same.

وإذا أقر الرجل في مرض موته بديون وعليه ديون في صحته وديون لزمته في مرضه بأسباب معلومة فدين الصحة والدين المعروف بالأسباب مقدم على غيره فإذا قضيت وفضل شيء كان فيما أقر به في حال المرض

If a person makes an acknowledgement of debts during his final illness,[352] whilst he has debts (that were due on him) prior to his illness as well as debts that he incurred during his illness for known reasons,[353] then the debts prior to his illness and the debts the reasons of which are known shall be preferred over other debts.[354] Once these are settled the debts that he made an acknowledgement of in his illness shall be paid.

وإن لم يكن عليه ديون في صحته جاز إقراره وكان المقر له أولى من الورثة

If he did not have any debts prior to his illness then the acknowledgement

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shall be void.

[351] If he doesn't provide any reason for the liability Imām Abū Yūsuf deems the acknowledgement to be invalid. According to Imām Muḥammad the acknowledgement shall be deemed valid if some plausible reason can be assumed even if he does not provide a reason.

[352] Final illness or Death-illness (*maraḍ al-mawt*) refers to an illness that

- renders a person unable to carry out his normal activities;
- normally results in death; and
- actually leads to death in the case of such person.

[353] E.g. The amount due for an item that he purchased or an item that he damaged.

[354] Although the acknowledgement is deemed valid it may not extinguish the rights of other creditors that are already established.

shall be valid and the beneficiary of such acknowledgement shall be preferred over the heirs.[355]

وإقرار المريض لوارثه باطل إلا أن يصدقه فيه بقية الورثة

The acknowledgement of a person in his final illness in favour of any heir of his is void unless the other heirs confirm the same.

ومن أقر لأجنبي في مرضه ثم قال هو ابني ثبت نسبه وبطل إقراره له
ولو أقر لأجنبية ثم تزوجها لم يبطل إقراره لها

If a person makes an acknowledgement in his final illness in favour of a non-relative and thereafter says, 'He is my son,' the lineage shall be established and the acknowledgement shall be void.[356] If a person makes an acknowledgement in favour of an unrelated woman and thereafter marries her, the acknowledgement in her favour shall not be void.[357]

ومن طلق زوجته في مرضه ثلاثا ثم أقر لها بدين ومات
فلها الأقل من الدين ومن ميراثها منه

If a person divorces[358] his wife thrice in his final illness and thereafter makes an acknowledgement of a debt in her favour and passes away[359], she shall

[355] In terms of the Islamic law of succession debts are given priority over the entitlements of heirs.

[356] The claim of paternity is projected retrospectively to the time he was conceived. This means that the acknowledgement was made for his son and is therefore void.

[357] The case of marriage is different to that of paternity in the sense that the marriage only takes place after the acknowledgement was made and therefore the acknowledgement remains valid.

[358] This applies when the divorce is issued at her request. If the divorce was issued by the husband unilaterally then the husband falls into the category of *al-fārr bi l-ṭalāq* i.e. a man who is attempting to preclude his wife from inheriting from his estate by divorcing her in his death-illness. In such a case the wife shall inherit her full share from the husband's estate, no matter what this amounts to.

[359] This applies if he passes away whilst she is still observing the mandatory waiting

receive the lesser[360] of the debt and her (share of) inheritance from him.

ومن أقر بغلام يولد مثله لمثله وليس له نسب معروف أنه ابنه وصدقة الغلام
ثبت نسبه منه وإن كان مريضا ويشارك الورثة في الميراث

If a person makes an acknowledgement of (the paternity of) a boy, the like of whom could be born to a person like him,[361] and who has no known lineage,[362] (claiming) that he is his son, and the boy confirms the same,[363] his lineage shall be established to him even if he is in his final illness and he shall share with the other heirs in the estate.

ويجوز إقرار الرجل بالوالدين والولد والزوجة والمولى ويقبل إقرار المرأة بالوالدين
والزوج والمولى ولا يقبل بالولد إلا أن يصدقها الزوج أو تشهد بولادتها قابلة
ومن أقر بنسب من غير الوالدين والولد والزوج والزوجة والمولى مثل الأخ والعم
لم يقبل إقراره في النسب فإن كان له وارث معروف قريب أو بعيد
فهو أولى بالميراث من المقر له وإن لم يكن له وارث استحق المقر له ميراثه
ومن مات أبوه فأقر بأخ له لم يثبت نسب أخيه ويشاركه في الميراث

A man may make an acknowledgement of parents, children, wife and master. A woman's acknowledgement of parents, husband and master shall be accepted.[364] Her acknowledgement of a child shall only be accepted if confirmed by the husband or if a midwife testifies to the childbirth.[365] If a

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period (*ʿidda*.) If the waiting period lapses prior to his passing away the acknowledgement shall be valid.

[360] Due to the possibility of collusion between them the lesser amount is given to her.

[361] In other words, the age difference between them admits the possibility of such an occurrence.

[362] If the boy has a known lineage, his lineage cannot be established to anyone else.

[363] This applies only if the boy is of the age where he can express himself.

[364] Since such acknowledgements do not involve any other person, as in the next case, they shall be valid if the person (i.e. the parent, spouse etc.) confirms the relationship.

[365] The acknowledgement of a child by a woman entails charging her husband with

person makes an acknowledgement of relationship to a person other than parents, children, husband, wife or master such as a brother or uncle such acknowledgement shall not be accepted with respect to lineage.[366] Thus if he has a known heir, whether close or distant, such heir shall have greater entitlement to the inheritance than the beneficiary of the acknowledgement. If the person does not have any heir the beneficiary of the acknowledgement shall be entitled to his inheritance. If a person's father passes away and he makes an acknowledgment of a brother of his, the relationship shall not be established but he shall share with him in the inheritance.[367]

paternity and this must be confirmed by the acknowledgement of the husband or evidence in the form of the testimony of the midwife. If the woman is unmarried her acknowledgement shall be valid immediately.

[366] This is because it entails charging someone else with the lineage e.g. the acknowledgement of a brother entails charging his father with his paternity.

[367] Since the acknowledgement entails two aspects (viz. charging someone else with paternity and sharing the inheritance) only the one that he has authority over shall be established i.e. sharing the inheritance.

كتاب الإجارة
Chapter: *Ijāra*[368] (Lease)

الإجارة عقد على المنافع بعوض ولا تصح حتى تكون المنافع معلومة والأجرة معلومة
وما جاز أن يكون ثمنا في البيع جاز أن يكون أجرة في الإجارة

Ijāra is a contract on benefits[369] in exchange for a consideration. It shall not be valid unless the benefits are known and the consideration is also known.[370] Anything that may be a price in a sale may be rental in *ijāra*.

والمنافع تارة تصير معلومة بالمدة كاستئجار الدور للسكنى والأرضين للزراعة
فيصح العقد على مدة معلومة أي مدة كانت

Benefits sometimes become known by (defining) the period such as the leasing of residential properties and lands for farming. In such a case the contract shall be valid by (defining) a known period, whatever the period may be.[371]

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[368] The term *ijāra* refers to both *ijāra al-aʿyān* (lease) and *ijāra al-aʿmāl* (hiring of services) and both of these types are discussed in this chapter.

[369] *Manāfiʿ* (lit. benefits such as the use of a property or asset or services received) are intangible and non-existent at the time of the contract and only come into existence when the asset is actually utilized or the service is rendered. The Sharīʿa has, nevertheless, permitted such a contract, on the basis of need, and deems it to come into effect moment by moment as the benefit comes into existence.

[370] Ambiguity with respect to the subject matter of the lease or the rental has the potential of resulting in dispute and will therefore invalidate the *ijāra* contract just as in the case of a sale contract.

[371] An *ijāra* may be contracted for any period of time, no matter how short or how long. Thus a long-term lease shall also be deemed to be an *ijāra* in terms of the Sharīʿa.

وتارة تصير معلومة بالعمل والتسمية كمن استأجر رجلا على صبغ ثوب أو خياطته
أو استأجر دابة ليحمل عليها مقدارا معلوما أو يركبها مسافة سماها

Sometimes they (benefits) become known by (defining) the work and (by) specification such as hiring a person to dye or sew a cloth; or hiring an animal to transport a known quantity (of goods) or to ride it for a specified distance.

وتارة تصير معلومة بالتعيين والإشارة
كمن استأجر رجلا لينقل له هذا الطعام إلى موضع معلوم

Sometimes they (benefits) become known known by identification and indication such as hiring a person to transport 'this wheat'[372] to a known place.[373]

ويجوز استئجار الدور والحوانيت للسكنى وإن لم يبين ما يعمل فيها
وله أن يعمل كل شيء إلا الحداد والقصار والطحان

The rental of dwellings and rooms for occupancy shall be valid even though he does not specify what he will do therein.[374] He shall have the right to do anything therein[375] besides (work as) a blacksmith, bleacher or miller.[376]

[372] The quantity of the wheat is not known but the wheat is clearly identified by indication and thus there is no room for disagreement later.
[373] The place may be defined or indicated.
[374] Since the use of the premises for residence or occupancy is customary this shall apply even if it is not specified in the contract.
[375] Although it was not stipulated in the contract, he shall have the right to do anything that does not cause damage to the building e.g. cooking, washing clothes etc.
[376] Since these involve heavy-duty processes, such as pounding, they are likely to cause damage to the building and are therefore precluded unless specifically mentioned. Using a hand-mill as is normally used in homes shall be permitted.

ويجوز استئجار الأراضي للزراعة ولا يصح العقد حتى يسمي ما يزرع فيها
أو يقول على أن يزرع فيها ما شاء

The rental of lands for farming shall be valid. The contract shall not be valid until he specifies what will be planted therein[377] or he stipulates that he may plant whatever he wishes therein.

ويجوز أن يستأجر الساحة ليبني فيها أو يغرس فيها نخلا أو شجرا
فإذا انقضت مدة الإجارة لزمه أن يقلع البناء والغرس ويسلمها فارغة
إلا أن يختار صاحب الأرض أن يغرم له قيمة ذلك مقلوعاً فيملكه
أو يرضى بتركه على حاله فيكون البناء لهذا والأرض لهذا

The rental of vacant land for the purpose of building thereon or planting of date-palms or trees shall be valid. When the period of the lease expires the lessee shall be liable to remove the building and plantation and hand it back (to the owner) vacant unless the owner of the land opts to reimburse him for the value of the same razed and assume ownership thereof; or consents to leaving it as is, in which case the building shall belong to one person and the land to another.

ويجوز استئجار الدواب للركوب والحمل فإن أطلق الركوب جاز له أن يركبها من شاء
وكذلك إن استأجر ثوبا للبس وأطلق فإن قال على أن يركبها فلان أو يلبس الثوب فلان
فأركبها غيره أو ألبسه غيره كان ضامنا إن عطبت الدابة أو تلف الثوب وكذلك كل ما
يختلف باختلاف المستعمل وأما العقار وما لا يختلف باختلاف المستعمل
فلا يعتبر تقييده فإذا شرط سكنى واحد فله أن يسكن غيره

The rental of animals for riding and transport (of goods) shall be valid. If he generalizes[378] the riding he shall have the right to let anyone he wishes ride

[377] Since the land may be damaged, depending on what is planted on it, it is a requirement, so as not to lead to any dispute later, that this ambiguity be removed by specifying what is to be planted on the land or by granting the option to the lessee to plant whatever he wishes.

the animal.[379] The same shall apply if he rents a garment for wearing and generalizes. If he stipulates that 'so and so will ride the animal' or 'wear the garment' and he thereafter lets another person ride the animal or wear the garment he shall be liable if the animal dies or the garment is ruined. This law shall apply to anything which differs by a difference in the user. In the case of immovable property and things that do not differ with a difference in the user, such a stipulation shall not be given consideration. Thus if he stipulates the occupancy of a specific person he may let another person occupy the property.

وإن سمى نوعا أو قدرا يحمله على الدابة مثل أن يقول خمسة أقفزة حنطة
فله أن يحمل ما هو مثل الحنطة في الضرر أو أقل كالشعير والسمسم
وليس له أن يحمل ما هو أضر من الحنطة كالملح والحديد
وإن استأجرها ليحمل عليها قطنا سماه فليس له أن يحمل مثل وزنه حديدا

If he specifies the type and quantity (of the item) that he will carry on the animal e.g. he says, 'five *qafīz* [380] of wheat' he may carry what is similar to or lesser than wheat in terms of the damage (it may cause) such as sesame or barley. He may not carry what is more damaging than wheat, such as salt and iron. If he rents the animal to carry a specified quantity of cotton he may not carry iron of the same weight.[381]

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[378] In other words, he does not qualify it by specifying who will ride the animal. This refers to the case when it is stipulated in the contract that he will have the right to designate the rider after the contract. If at the time of the contract the name of the rider is not specified or the option is not given to the lessee to designate the rider, the lease shall be invalid.

[379] Since this was stipulated in the contract he shall have the option to designate the rider. Once he does so only that person may ride the animal thereafter.

[380] As mentioned previously, *qafīz* is a dry measure of volume equivalent to 12 *ṣāʿ* which is 40.344 litres or 39138 grams of wheat. (*Muʿjam Lughat al-Fuqahāʾ*).

[381] Although the weight may be the same, the difference between cotton and iron is that cotton spreads out over the back of the animal whilst iron is concentrated in one area.

وإن استأجرها ليركبها فأردف معه رجلا فعطبت ضمن نصف قيمتها ولا يعتبر بالثقل وإن استأجرها ليحمل عليها مقدارا من الحنطة فحمل أكثر منه فعطبت ضمن ما زاد الثقل وإذا كبح الدابة بلجامها أو ضربها فعطبت ضمن عند أبي حنيفة

If he rents it to ride it himself and thereafter makes another person ride behind him and the animal dies he shall be liable[382] for half of its value[383] regardless of the weight.[384] If he rents it to carry an amount of wheat and thereafter carries more than that and the animal dies he shall be liable for the excess weight.[385] If he pulls the animal by its reigns or strikes it[386] and it dies he shall be liable according to Imām Abū Ḥanīfa.[387]

[382] The liability is due to breach of the term of the contract.

[383] Since there were two people who rode the animal and only one was allowed in terms of the contract he shall be liable for half the value of the animal. It must be noted that this refers to the case where the animal was capable of carrying two people. If not, he shall be liable for the full value of the animal.

[384] With respect to riding animals the weight of the rider is not as significant as his skill in riding. Therefore weight is not considered in this case as opposed to the next case.

[385] In this case the weight is considered and the liability will be in proportion to the excess weight. Here too it must be noted that this refers to the case where the animal was capable of carrying that quantity of wheat including the excess. If not, he shall be liable for the full value of the animal.

[386] This refers to pulling or striking the animal in the usual manner.

[387] Even though he did this in the usual manner Imām Abū Ḥanīfa holds him liable and regards such action to fall outside the scope of what is permitted by the owner. According to Imām Abū Yūsuf and Imām Muḥammad he shall only be liable if he goes against the usual manner or extent of such action.

والأجراء على ضربين أجير مشترك وأجير خاص فالمشترك من لا يستحق الأجرة حتى يعمل كالصباغ والقصار والمتاع أمانة في يده إن هلك لم يضمن شيئا عند أبي حنيفة وقال أبو يوسف ومحمد يضمنه وما تلف بعمله كتخريق الثوب من دقه وزلق الحمال وانقطاع الحبل الذي يشد به المكاري الحمل وغرق السفينة من مدها مضمون إلا أنه لا يضمن به بني آدم ممن غرق في السفينة أو سقط من الدابة لم يضمنه

There are two types of hired persons:[388] a common hired person and a specific hired person. A common hired person[389] is one who only entitled to the fee once he does the work such as a dyer or bleacher. The goods shall be a trust in his hand and if they are destroyed he shall not be liable for them according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad he shall be liable.[390] Any thing that is ruined by his work such as the cloth's tearing by his pounding it, the porter's slipping, the rope that the transporter used to tie the load snapping and the ship's sinking by his steering it. However he shall not be held liable for human beings[391] who drown in the ship or fall from the animal.

[388] This is the beginning of the discussion on *ijāra al-aʿmāl* – also known as *ijāra al-ashkhāṣ.*

[389] A common hired person (*ajīr mushtarak*) is a person who is hired by more than one person at the same time or by one person without his work being defined by time. In other words it refers to a worker, such as a tailor, who offers his services to many and thus may be contracted by several clients at once.

[390] However in the event of a major catastrophe, such as a widespread fire, he is not liable even according to Imām Abū Yūsuf and Imām Muḥammad.

[391] Liability for human beings is only imposed as a result of an offence (*jināya*) and cannot be based on a contract.

وإذا فصد الفصاد أو بزغ البزاغ ولم يتجاوز الموضع المعتاد
فلا ضمان عليه فيما عطب من ذلك

When a phlebotomist[392] carries out a venesection or an animal surgeon performs surgery without going beyond the normal area, there shall be no liability on them for any damage arising from such procedure.

والأجير الخاص الذي يستحق الأجرة بتسليم نفسه في المدة وإن لم يعمل
كمن استؤجر شهرا للخدمة أو لرعي الغنم ولا ضمان على الأجير الخاص
فيما تلف في يده ولا ما تلف من عمله

A specific hired person[393] is one who is entitled to the fee by presenting himself in the period even if he does not work e.g. a person who is hired for a month to do service or to herd goats. There shall be no liability on the specific hired person for anything that is damaged in his hand and nor for anything that is damaged on account of his work.[394]

والإجارة تفسدها الشروط كما تفسد البيع

A lease shall be invalidated by (invalid) conditions just as a sale becomes invalid.[395]

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[392] The Arabic word *faṣd* (phlebotomy or venesection) refers to a procedure in which an incision is made into a vein and blood is removed for purposes of treatment. A person who performs phlebotomy is called a 'phlebotomist', although doctors, nurses, medical laboratory scientists and others perform some phlebotomy procedures in many countries.

[393] A specific hired person (*ajīr khāṣṣ*) refers to a person whose services are exclusively available to a particular employer in a stipulated period.

[394] The specific hired person acts on behalf of the owner of the item who owns his services for that period. Thus, any action he does is attributable to the owner himself as long as such action is carried out in the usually accepted manner. Any violation of the norm shall result in liability.

[395] *Ijāra* is similar to a sale contract in that both are commutative contracts that are affected by invaliding conditions.

ومن استأجر عبدا للخدمة فليس له أن يسافر به إلا أن يشترط ذلك
ومن استأجر جملا ليحمل عليه محملا وراكبين إلى مكة جاز وله المحمل المعتاد
وإن شاهد الجمال المحمل فهو أجود وإن استأجر بعيرا ليحمل عليه مقدارا من الزاد
فأكل منه في الطريق جاز له أن يرد عوض ما أكل

If a person hires a slave to serve him he shall not have the right to travel[396] with him unless he stipulated that (in the contract.) A person may hire a camel to carry a litter[397] and two riders to Makkah. In such a case he shall have the right to an ordinary litter but it is best if the camel-driver sees the litter. If a person hires a camel to load a specified amount of provision (for the journey) and he eats from it on the way he may replace the quantity he consumed.[398]

والأجرة لا تجب بالعقد وتستحق بأحد معان ثلاثة
إما بشرط التعجيل أو بالتعجيل من غير شرط أو باستيفاء المعقود عليه

The rental (or fee in an *ijāra* contract) shall not become due by (merely concluding) the contract[399] but shall become due by one of three ways:

[396] Since service during travel is more difficult this cannot be imposed on the person hired without his consent, unless the usual practice is to travel with such a slave – in which case he may travel with him.

[397] This is also known as a howdah, or houdah derived from the Arabic *hawdaj*, and is a carriage which is positioned on the back of an animal (such as a camel or elephant) that is used for the transport of persons.

[398] This is because he has the right to carry the full amount specified throughout the length of the journey.

[399] This is unlike the case of a sale contract in which payment of the purchase price becomes due on the purchaser by merely concluding the contract unless it was specifically deferred.

Stipulation of advance payment, advance payment without stipulation[400] or receipt of the subject matter[401] of the contract.

ومن استأجر دارا فللمؤجر أن يطالبه بأجرة كل يوم إلا أن يبين وقت الاستحقاق بالعقد
ومن استأجر بعيرا إلى مكة فللجمال أن يطالبه بأجرة كل مرحلة
وليس للقصار والخياط أن يطالب بالأجرة حتى يفرغ من العمل إلا أن يشترط التعجيل

If a person rents a house, the lessor may demand from him the rental daily unless the (payment) due date is specified in the contract. If a person hires a camel to Makka the camel-driver may demand the rental for each stage.[402] A bleacher or tailor may only demand the fee when they complete the job unless advance payment was stipulated.

ومن استأجر خبازا ليخبز له في بيته قفيز دقيق بدرهم لم يستحق الأجرة حتى يخرج
الخبز من التنور ومن استأجر طباخا ليطبخ له طعاما للوليمة فالغرف عليه
ومن استأجر رجلاً ليضرب له لبنا استحق الأجرة إذا أقامه عند أبي حنيفة
وقال أبو يوسف ومحمد لا يستحقها حتى يشرجه

If a person hires a baker to bake one *qafīz* of wheat in his house for one dirham, the baker shall only be entitled to the fee when he takes the bread out of the oven.[403] If a person hires a cook to prepare a *walīma* meal for him, the cook shall be liable for dishing it out.[404] If a person hires a person to

[400] If the lessee makes payment to the lessor in advance he shall not have the right to claim this amount back even though the contract did not stipulate advance payment.

[401] Since *Ijāra* is a commutative contract, once the contracted benefits are received in full by the lessee or hirer payment of the rental or fee shall become due.

[402] A *marḥala* refers to a stage of a journey that was equivalent to one day's journey of loaded camels (*Muʿjam Lughat al-Fuqahāʾ*.) After each *marḥala* a *manzil* (inn) in which travellers could rest for the night used to be located.

[403] The job is only complete once the bread is baked and taken out of the oven.

[404] Many of these cases depend on the prevalent custom (*ʿurf*) in a particular time and place.

make bricks for him, he shall be entitled to the fee once he forms them according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad he shall only be entitled to the fee once he stacks them up.[405]

وإذا قال للخياط إن خطت هذا الثوب فارسيا فبدرهم وإن خطته روميا فبدرهمين
جاز وأي العملين عمل استحق الأجرة

If a person says to a tailor, 'If you sew this cloth into a Persian style garment it will be one dirham[406] and if you sew it into a Roman style garment it will be two dirhams[407], it shall be valid and he shall be entitled to the fee for whichever of the two jobs he does.

وإن قال إن خطته اليوم فبدرهم وإن خطته غدا فبنصف درهم
فإن خاطه اليوم فله درهم وإن خاطه غدا فله أجر مثله عند أبي حنيفة
ولا يتجاوز به نصف درهم

If he says, 'If you sew it today it will be one dirham and if you sew it tomorrow it will be half a dirham' then, according to Imām Abū Ḥanīfa, if he sews it today he shall be entitled to one dirham and if he sews it tomorrow he shall be entitled to the market fee[408] which may not exceed half a dirham.

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[405] Imām Abū Yūsuf and Imām Muḥammad regard stacking the bricks as being part of the completion of the job, because prior to this there is a possibility of them flopping.

[406] This refers to the fee for that job.

[407] The tailor is given the option to do whichever of the two jobs he chooses. Since each of the jobs is distinct, this option shall be valid and is similar to *khiyār al-taʿyīn* (option of specification) for a number of items in a sale contract.

[408] Imām Abū Ḥanīfa considers the stipulation 'if you sew it tomorrow it will be half a dirham' to be invalid as it defines both time and work making the subject matter of the *Ijāra* ambiguous. In such instance the market fee applies. According to Imām Abū Yūsuf and Imām Muḥammad he shall be entitled to the stipulated fee as per the agreement when he completes the job.

وإن قال إن سكنت في هذا الدكان عطارا فبدرهم في الشهر وإن سكنته حدادا فبدرهمين جاز وأي الأمرين فعل استحق المسمى فيه عند أبي حنيفة وقال أبو يوسف ومحمدٌ الإجارة فاسدة

It shall be valid if he says, 'If you occupy this shop as a druggist it will be for one dirham per month and if you occupy it as a blacksmith it will be for two dirhams.' He shall be entitled to the stipulated fee for whichever of the two things he does according to Imām Abū Ḥanīfa.[409] According to Imām Abū Yūsuf and Imām Muḥammad the *Ijāra* shall be invalid.[410]

ومن استأجر دارا كل شهر بدرهم فالعقد صحيح في شهر واحد فاسد في بقية الشهور إلا أن يسمي جملة شهور معلومة فإن سكن ساعة من الشهر الثاني صح العقد فيه ولم يكن للمؤجر أن يخرجه منها إلى أن ينقضي وكذلك كل شهر يسكن في أوله

If a person rents a property 'every month for one dirham' the contract shall be valid for one month and invalid for the remaining months unless he specifies the total number of months such that it is known.[411] If he resides (in the property) for a moment[412] of the second month, the contract shall become valid for it and the lessor shall not have the right to remove him until the end of the second month. This applies to every month in the beginning of which he resides.

[409] This is similar to the case of the Persian or Roman garment discussed above and the lessee is given the option to choose one of the two distinct contracts.

[410] Imām Abū Yūsuf and Imām Muḥammad consider the lease to be invalid as the rental for the benefit of occupation, which is the subject matter of the contract, is ambiguous.

[411] This is similar to the case of the sale of a heap of wheat "every *qafīz* for one dirham" discussed at the beginning of the book of sale. Due to the ambiguity of the total number of months the lease is valid only for one month.

[412] The preferred view is that a grace of one day (24 hours) is granted.

وإذا استأجر دارا سنة بعشرة دراهم جاز وإن لم يسم قسط كل شهر من الأجرة

If a person rents a house for one year in exchange for ten dirhams it shall be valid even though he did not stipulate the portion of rental for each month.

ويجوز أخذ أجرة الحمام والحجام ولا يجوز أخذ أجرة عسب التيس
ولا يجوز الاستئجار على الأذان والإقامة والحج والغناء والنوح

It shall be valid to take the fee (paid for the use) of a public bath[413] and cupper.[414] It shall not be valid to take a fee for the mating of a stud.[415] It shall not be valid to hire a person for *adhān*, *iqāma*, *ḥajj* [416] and for singing and mourning.[417]

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[413] Even though the benefits, such as the time to be spent and the amount of water to be used, are not clearly defined and are in fact ambiguous (*majhūl*) the early jurists allowed this transaction on the basis of common practice in the wider society (*taʿāmul*) because this practice rarely, if ever, lead to dispute.

[414] This rule is specifically mentioned by the author due to a doubt that may arise as there is a ḥadīth that refers to the earnings of a cupper as being impure (*khabīth*.) However it is also recorded in the ḥadīth that the Prophet ﷺ himself paid a cupper for his services. The Ḥanafī scholars therefore understand the first ḥadīth to mean that the profession of cupping is discouraged as it involves dealing with impurities such as blood.

[415] This has been specifically prohibited in the ḥadīth and refers to the prohibition of stud fees which is a common practice even nowadays. In addition a live foal guarantee is a common provision in modern horse breeding contracts. This is a form of a warranty offered to the mare owner by the stallion owner and basically says that if the mare fails to produce a live foal from the breeding, the stallion owner will breed the same mare again without charging another stud fee.

[416] The original position in the Ḥanafī school was that it is not valid to hire someone to perform acts of reward, such as those mentioned in the text, as the reward for acts of worship is earned by the doer himself and he cannot be paid for such acts. Later scholars, however, have permitted hiring a person for some of these acts, such as teaching of Qurʾān, due to the need of the time and the lack of individuals prepared to offer such services purely for reward. Another reason was that in earlier times teachers and Imāms would receive grants from the State that would suffice for their needs allowing them to dedicate their time to teaching. When this

ولا تجوز إجارة المشاع عند أبي حنيفة إلا من الشريك
وقال أبو يوسف ومحمد إجارة المشاع جائزة

The lease of a (share in) common property[418] shall not be valid according to Imām Abū Ḥanīfa unless it is (leased) to the partner. According to Imām Abū Yūsuf and Imām Muḥammad, the lease of a (share in) common property shall be valid.

ويجوز استئجار الظئر بأجرة معلومة ويجوز بطعامها وكسوتها وليس للمستأجر أن يمنع
زوجها من وطئها فإن حبلت كان لهم أن يفسخوا الإجارة إذا خافوا على الصبي من لبنها
وعليها أن تصلح طعام الصبي وإن أرضعته في المدة بلبن شاة فلا أجر لها

The hiring of a wet-nurse[419] in exchange for a known fee shall be valid. It shall also be valid (if it is) in exchange for her food and clothing.[420] The hirer

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practice stopped, it became necessary for them earn their livelihood in other ways and as a result many of them were unable to dedicate sufficient time for teaching.

[417] An *ijāra* contract cannot be concluded for sinful acts such as mourning and singing which are prohibited.

[418] *Mushāʿ* refers to an undivided share held in common property e.g. If a person leases his 50% share in a house to a third party this is not valid. This is because the lessor is unable to deliver the subject matter of the lease to the lessee due to the fact that it is common property. However if he leases his 50% share to his partner, who is the owner of the other 50%, this shall be valid as he will enjoy the benefit of the entire property.

[419] The Qur'ān (2: 2:233 and 65:6-7) validates this type of *ijāra*. The contract is deemed valid despite the fact that there is an element of ambiguity with respect to the quantity of milk, the number of times the baby will require breastfeeding etc. However, in common practice, such ambiguity does not lead to dispute and therefore the contract is valid. It must be noted that the validity applies only in the case of humans and not animals. Hence, it is not valid to rent a dairy cow for its milk.

[420] Although the precise quantity of food and clothing is not specified in the contract, Imām Abū Ḥanīfa allows this on the basis of juristic equity (*istiḥsān*) since the ambiguity does not lead to a dispute as the common practice was for fathers to spend generously on women nursing their children.

shall not have the right to prevent her husband from having intercourse with her. If she becomes pregnant they[421] shall have the right to cancel the *Ijāra* if they fear for the child because of her milk. It shall (also) be her duty[422] to prepare the child's food. If she feeds the child with the milk of a sheep during the period she shall not be entitled to a fee.

وكل صانع لعمله أثر في العين كالقصار والصباغ فله أن يحبس العين بعد الفراغ من عمله
حتى يستوفي الأجرة ومن ليس لعمله أثر فليس له أن يحبس العين بالأجرة
كالحمال والملاح

Any workman whose work has an effect in the article, such as a bleacher or dyer, shall have the right to withhold[423] the article upon completion of the work until he receives payment. Any person whose work does not have an effect in the article shall not have the right to withhold the article in lieu of payment, such as a porter and a seaman.[424]

وإذا شرط على الصانع أن يعمل بنفسه فليس له أن يستعمل غيره
فإن أطلق له العمل فله أن يستأجر من يعمله

If it is stipulated that the workman must do the job himself he shall not have the right to get another person to do the job. If the work is left unspecified he may hire another person to do the job.

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[421] 'They' refers to the child's guardians.

[422] With respect to matters not stipulated in the contract, the prevalent custom (*ʿurf*) will be applicable. Hence, preparation of the child's food, washing the child's clothes etc. will also be the duty of the wet-nurse if this was customary.

[423] Since the subject matter of the contract is a visible feature in the article, the article may be withheld until payment is received just as the subject matter of a sale contract may be withheld until the purchase price is paid.

[424] In this case the subject matter of the contract is the work itself, which does not exist in the article and it is not possible to withhold it.

وإذا اختلف الخياط وصاحب الثوب فقال صاحب الثوب أمرتك أن تعمله قباء وقال الخياط قميصا أو قال صاحب الثوب للصباغ أمرتك أن تصبغه أحمر فصبغته أصفر فالقول قول صاحب الثوب مع يمينه فإن حلف فالخياط ضامن

If the tailor and the owner of the cloth have a disagreement in which the owner of the cloth says, 'I instructed you to make it into a cloak' and the tailor says, 'shirt'; or the owner of the cloth says to the dyer, 'I instructed you to dye it red but you dyed it yellow,' the statement of the owner of the cloth shall be accepted[425] together with his oath. If he swears the oath the tailor shall be liable.

وإذا قال صاحب الثوب عملته لي بغير أجرة وقال الصانع بأجرة فالقول قول صاحب الثوب مع يمينه عند أبي حنيفة وقال أبو يوسف إن كان حريفا له فله الأجرة وإن لم يكن حريفا له فلا أجرة له وقال محمد إن كان الصانع معروفا بهذه الصنعة أن يعمل بالأجرة فالقول قوله إنه عمله بأجرة

If the owner of the cloth says, 'You did the job for me at no charge, and the workman says, '(It was) in exchange for a fee' the statement of the owner of the cloth shall be accepted[426] together with his oath according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf, if he was a customer of his he shall be entitled to the fee[427] and if not he shall not be entitled to the fee. According to Imām Muḥammad, if the workman was known to do such work for a fee[428] his statement shall be accepted that he had done the job in exchange for a fee.

[425] Since the instruction for the job originates from the owner of the cloth, his statement will be accepted. However his oath will also be required because he is denying something which he would have been liable for had he acknowledged it.

[426] Since he is denying liability his statement shall be accepted in accordance with the principle established by the ḥadīth that, 'the claimant has to produce evidence and the denier has to take an oath.'

[427] According to Imām Abū Yūsuf, the established practice between them is assumed to be the default and anything contrary will require specific evidence.

[428] In other words, he does this for a living.

والواجب في الإجارة الفاسدة أجر المثل لا يتجاوز به المسمى

In an invalid (*fāsid*) *ijāra* the market fee (or rental) shall be due[429] as long as it does not exceed the stipulated amount.

وإذا قبض المستأجر الدار فعليه الأجرة وإن لم يسكنها
فإن غصبها غاصب من يده سقطت الأجرة وإن وجد بها عيبا يضر بالسكنى فله الفسخ
وإذا خربت الدار أو انقطع شرب الضيعة أو انقطع الماء عن الرحى انفسخت الإجارة

When the lessee takes possession of the property he shall be liable for the rental even though he does not occupy it.[430] If it is usurped from his hand by some person the rental shall fall away.[431] If he finds a defect in it that hinders occupation he shall have the right to cancel (the contract.) If the property falls apart, or the irrigation to the land is cut off, or the water is cut off from the mill the *Ijāra* shall become cancelled.[432]

[429] Since the contract was not valid, the amount of the rental or fee stipulated therein shall not take effect. Instead, the market fee or rental will become due. However because the parties had agreed to forego any excess on the stipulated amount this market fee or rental shall not exceed that amount.

[430] Since it is not conceivable for the lessor to hand over the usufruct itself to the lessee, the handing over of the property shall be sufficient. This is because once the lessee takes possession of the property he is in a position to make use of it by occupying it. This rule applies in the case of a valid *ijāra* only and not in the case of an invalid *ijāra*, in which instance payment shall only be due if he actually occupied the property.

[431] In such a situation he no longer has the ability to make use of the property and therefore he is not liable for any rental.

[432] In these situations the usufruct, which is the subject matter of the *ijāra* contract is totally lost and the contract therefore becomes cancelled.

وإذا مات أحد المتعاقدين وقد عقد الإجارة لنفسه انفسخت الإجارة
وإن عقدها لغيره لم تنفسخ

If any of the two contracting parties passes away, and such person had contracted the *ijāra* as principal, the *ijāra* shall become cancelled. If he had contracted it for a third party[433] it shall not become cancelled.

ويصح شرط الخيار في الإجارة

It shall be valid to stipulate an option (of cancellation) in an *Ijāra* contract.[434]

وتنفسخ الإجارة بالأعذار كمن استأجر دكانا في السوق ليتجر فيه فذهب ماله وكمن آجر
دارا أو دكانا ثم أفلس ولزمته ديون لا يقدر على قضائها إلا من ثمن ما آجر
فسخ القاضي العقد وباعها في الدين وكمن استأجر دابة ليسافر عليها ثم بدا له
من السفر فهو عذر وإن بدا للمكاري من السفر فليس ذلك بعذر

Ijāra shall become cancelled for (valid) reasons such as if a person rents a shop in the market to do business therein and thereafter loses all his wealth.[435] (Another example is) if a person leases out a property or shop (to someone) and thereafter becomes insolvent and liable for debts that can only be settled by the price of what he leased, the judge shall cancel the contract (of *ijāra*) and sell the property to settle the debt. (A third example is) if a person hires an animal for a journey and thereafter he no longer intends to make that journey.[436] If the person who hired out the animal to him no

[433] E.g. if he was a proxy or guardian acting on behalf of someone else.

[434] *Ijāra* is similar to a sale contract in that they are commutative contracts in which possession is not required to be taken in the contractual session. The option of stipulation is therefore permitted.

[435] In such a case it will not be possible for the lessee to proceed with the lease without undergoing additional harm that was not due in the contract.

[436] In this case as well it will not be possible for the one who hired the animal to proceed with the contract without undergoing additional harm that was not due in the contract, as the reason for his travel may not be existent any longer and forcing him to travel will impose additional harm on him.

longer intends to make that journey it shall not be (deemed) a valid excuse.[437]

[437] This is because he does not have to go out himself and can send someone else (e.g. an employee of his) on his behalf. Thus, no additional harm is caused to him by proceeding with the contract.

كتاب الشفعة

Chapter: Pre-emption[438]

الشفعة واجبة للخليط في نفس المبيع ثم للخليط في حق المبيع كالشرب والطريق
ثم للجار وليس للشريك في الطريق والشرب والجار شفعة مع الخليط
فإن سلم فالشفعة للشريك في الطريق فإن سلم أخذها الجار

Pre-emption shall be binding (as a right) for the co-owner in the item of sale,[439] thereafter the partner in the right of the item of sale, such as irrigation and passage,[440] and thereafter the neighbour. The partner who shares the (right of) passage and irrigation and the neighbour shall not have (the right of) pre-emption in the presence of the co-owner. If he gives up

[438] The Arabic word used is *shufʿa* and literally refers to attaching or subjoining one thing to another. In the Sharīʿa it refers to the right to forcefully acquire ownership of immovable property from a purchaser. The English translation 'pre-emption' is used even though, as is the case with all English terms used for Islamic jurisprudential terminology, this may not be identical to the concept of *shufʿa* set forth by the scholars of Islamic jurisprudence.
In terms of the legal definition, pre-emption or the right of pre-emption refers to a contractual right to acquire certain property newly coming into existence before it can be offered to any other person or entity. It is also called a 'first option to buy.' It comes from the Latin verb *emo*, *emere*, *emi*, *emptum*, to buy or purchase, plus the inseparable preposition pre, before. A right to acquire existing property in preference to any other person is usually referred to as a 'right of first refusal.'

[439] This refers to a co-owner in the property itself e.g. a person who holds a 50% undivided interest in common property.

[440] This refers to a person who owns a property that shares the right to use water from a private river or the right to use a private passage. 'Private' in this context is used as opposed to public. Sharing a public river or a public road or passage does not give rise to any right of pre-emption. A private road is one with a dead-end that affords no exit (cul-de-sac.) A private river is defined, according to Imām Abū Ḥanīfa and Imām Muḥammad, as one in which boats don't sail.

(such right) the (right of) pre-emption shall be for the partner in passage. If he (too) gives up (the right) the neighbour shall take it.

والشفعة تجب بعقد البيع وتستقر بالإشهاد
وتملك بالأخذ إذا سلمها المشتري أو حكم بها حاكم

The (right of) pre-emption shall become due once the contract of sale takes place. It shall become fixed by calling witnesses[441] and ownership shall pass by taking it[442] when the purchaser hands it over or the court passes judgement.

وإذا علم الشفيع بالبيع أشهد في مجلسه ذلك على المطالبة ثم ينهض منه فيشهد على البائع إن كان المبيع في يده أو على المبتاع أو عند العقار فإذا فعل ذلك استقرت شفعته ولم تسقط بالتأخير عند أبي حنيفة وقال محمد إن تركها شهرا بعد الإشهاد بطلت شفعته

When the pre-emptor learns of the sale he must call witnesses[443] to his claim in the same session. He must thereafter call witnesses[444] against the seller, if the item of sale is in his hand,[445] or against the purchaser or at the property. Once he does this his (right of) pre-emption becomes fixed and shall not lapse by a delay according to Imām Abū Ḥanīfa. According to Imām Muḥammad, if he abandons it for a month after calling witnesses his (right

[441] This refers to *ṭalab al-ishhād* referred to below, which is done after *ṭalab al-muwāthaba*.

[442] Ownership only passes at this stage and if the pre-emptor has to pass away prior to this, the house will not form part of his estate.

[443] This is known as *ṭalab al-muwāthaba* and must be done as soon as he comes to know of the sale. The reason for this is that *shufʿa* is a weak right that becomes void if ignored. The pre-emptor therefore has to immediately indicate his interest in claiming this right. It is best, although not necessary, that he calls witnesses at this stage, as he may be required to prove his immediate expression of interest before the court should the defendant dispute the same.

[444] This is known as *ṭalab al-ishhād*.

[445] Once the item of sale leaves the hand of the seller, the seller is no longer linked to the transaction.

of) pre-emption shall become void.[446]

والشفعة واجبة في العقار وإن كان مما لا يقسم ولا شفعة في العروض والسفن

Shufʿa shall become due in immovable property,[447] even though it cannot be partitioned.[448] There shall be no *shufʿa* in goods and ships.[449]

والمسلم والذمي في الشفعة سواء

A Muslim and a *dhimmī*[450] shall be equal with respect to *shufʿa*.

وإذا ملك العقار بعوض هو مال وجبت فيه الشفعة
ولا شفعة في الدار التي يتزوج الرجل عليها أو يخالع المرأة بها أو يستأجر بها دارا
أو يصالح بها عن دم عمد أو يعتق عليها عبدا أو يصالح عنها بإنكار أو سكوت
فإن صالح عنها بإقرار وجبت فيها الشفعة

When a person becomes the owner[451] of immovable property in exchange for a consideration that is wealth, *shufʿa* shall be due. There shall be no *shufʿa* in a property[452] with which a man gets married,[453] makes *khulʿ* with a woman,[454]

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[446] His argument is that allowing the right of pre-emption to continue indefinitely prejudices the purchaser as he is unable to develop the property due to being uncertain about the pre-emptor's intentions.

[447] The wisdom behind granting the right of *shufʿa* is to prevent the potential harm arising from a bad associate or neighbour. There is no *shufʿa* in movable items such as a vehicle or goods as these are not as permanent as immovable property.

[448] This refers to a property that cannot serve its main purpose when partitioned. Some editions of the *Mukhtaṣar* give the following examples of such a property: a bath, mill, well or small house.

[449] As stated above there is no *shufʿa* in movable items.

[450] As non-Muslim subjects within an Islamic State, *dhimmīs* enjoy the same rights as Muslims and are liable for the same obligations.

[451] This applies to acquiring ownership through a purchase and sale or any other transaction such as a gift with an exchange.

[452] In the examples mentioned the exchange, if found, is not deemed to be wealth.

[453] The house is given by a man as dowry to a woman.

rents a house,[455] settles a deliberate murder,[456] frees a slave,[457] or reaches a settlement for with denial or silence.[458] If he reaches a settlement with acknowledgement[459] *shufʿa* shall be due.

وإذا تقدم الشفيع إلى القاضي فادعى الشراء وطلب الشفعة سأل القاضي المدعى عليه فإن اعترف بملكه الذي يشفع به وإلا كلفه إقامة البينة فإن عجز عن البينة استحلف المشتري بالله ما تعلم أنه مالك للذي ذكره مما يشفع به فإن نكل أو قامت بينة سأله القاضي هل ابتاع أم لا فإن أنكر الابتياع قيل للشفيع أقم البينة فإن عجز عنها استحلف المشتري بالله ما اتباع أو بالله ما يستحق علي في هذه الدار شفعة من الوجه الذي ذكره

When the pre-emptor appears before the judge and claims (that) the purchase (occurred) and (that he is entitled to) the (right of) *shufʿa*, the judge shall question the defendant.[460] If he admits his ownership of the property by means of which he is claiming *shufʿa* (then it shall be in order.) If not, the judge shall require him to establish evidence. If he is not able to provide evidence the judge shall request the purchaser to take an oath that, 'By Allah, you do not know of his being the owner of what he mentioned and by means of which he is claiming *shufʿa*.' If he declines (to take the oath) or evidence is established[461], the judge shall ask him whether he purchased or not. If he denies having purchased the pre-emptor shall be asked to

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[454] The house is given by a wife as consideration for the *khulʿ*.

[455] The house is given as rental payment for the use of another house.

[456] The house is given in exchange for the family of the victim foregoing their right to retaliation (*qiṣāṣ*).

[457] The house is given by a slave to his master in exchange for his freedom.

[458] A dispute regarding the house is settled after the person against whom the claim was made denied such claim or remained silent regarding it.

[459] Settlement after acknowledgement is deemed to be a mutual exchange and is tantamount to a sale transaction.

[460] The judge shall ask him about the pre-emptor's ownership of the property by means of which he is claiming *shufʿa*.

[461] When either of these occur his ownership of that property and thus his right of pre-emption shall be established.

establish evidence.[462] If he is not able to do so the judge shall request the purchaser to take an oath that 'by Allah he did not purchase' or 'by Allah, he is not entitled to *shufʿa* in this property against me in the manner that he mentioned.'[463]

وتجوز المنازعة في الشفعة وإن لم يحضر الشفيع الثمن إلى مجلس القاضي
فإذا قضى القاضي له بالشفعة لزمه إحضار الثمن

The case for *shufʿa* may take place even though the pre-emptor did not bring the purchase amount to the court. When the judge passes judgement for *shufʿa* in his favour he shall be required to bring the purchase amount.

وللشفيع أن يرد الدار بخيار العيب والرؤية

The pre-emptor may return the property on the basis of the option of defect or the on sight option.[464]

فإن أحضر الشفيع البائع والمبيع في يده فله أن يخاصمه في الشفعة
ولا يسمع القاضي البينة حتى يحضر المشتري فيفسخ البيع بمشهد منه
ويقضي بالشفعة على البائع ويجعل العهدة عليه

When the pre-emptor presents the seller (to court), whilst the subject of sale is (still) in his hand, he shall have the right to dispute the case with him. The judge shall not hear evidence until the purchaser is present so that he can cancel the sale in his presence[465] and then pass judgement for pre-emption

[462] This is because the right of pre-emption only becomes due when the sale is established.

[463] If the purchaser acknowledges having purchased or refuses to swear the oath that he didn't purchase, the pre-emptor will be granted the right of pre-emption.

[464] Taking a property on the basis of pre-emption is tantamount to purchasing it and gives the purchaser the options that he would be entitled to in a purchase and sale transaction.

[465] This is because the purchaser is the actual owner of the property.

against the seller and place the onus on him.[466]

وإذا ترك الشفيع الإشهاد حين علم وهو يقدر على ذلك بطلت شفعته
وكذلك إن أشهد في المجلس ولم يشهد على أحد المتبايعين ولا عند العقار

If the pre-emptor fails to call witnesses when he first comes to know (of the sale,) despite being able to do so, his (right of) pre-emption shall be void.[467] The same shall apply if he calls witnesses in that session but does not call witnesses against one of the two contracting parties or at the property.

وإن صالح من شفعته على عوض أخذه بطلت شفعته ويرد العوض

If he settles regarding the pre-emption on some consideration that he receives, his (right of) pre-emption shall become void and he must return the consideration.[468]

وإذا مات الشفيع بطلت شفعته وإن مات المشتري لم تسقط

If the pre-emptor dies[469] his (right of) pre-emption shall become void.[470] If

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[466] This is called *ḍamān al-ʿuhda* and is also known as *ḍamān al-darak*, which will be discussed in a later footnote. In other words, if someone later on establishes his entitlement in the property (*istiḥqāq*) the onus shall be on the seller to return the purchase price to the pre-emptor. This is contrary to the situation where the purchaser has already taken possession of the property and the pre-emptor takes the property from him – in which case the onus shall be on the purchaser and not the seller.

[467] As discussed previously, *shufʿa* is a weak right that becomes void if ignored.

[468] The *shufʿa* becomes void due to his indication of not wishing to claim his right. The consideration that was taken will have to be returned as it is not permissible in Sharīʿa to take a consideration in lieu of the right of preemption as it is merely a right to ownership and any consideration taken in lieu of such a right is deemed a bribe.

[469] This refers to when he dies after the sale takes place but before judgement is passed in his favour.

[470] A requirement for the right of pre-emption to remain in effect is that ownership

the purchaser dies the (right of) pre-emption shall not fall away.

وإن باع الشفيع ما يشفع به قبل أن يقضى له بالشفعة بطلت شفعته

If the pre-emptor sells the property by virtue of which he is claiming *shufʿa*, prior to judgement of *shufʿa* being passed in his favour, the (right of) pre-emption shall become void.

ووكيل البائع إذا باع وكان هو الشفيع فلا شفعة له وكذلك إن ضمن الدرك عن البائع الشفيع ووكيل المشتري إذا ابتاع فله الشفعة

If the seller's proxy, who is the pre-emptor concludes the sale he shall not be entitled to pre-emption. The same shall apply if he stands surety for misrepresentation[471] on behalf of the seller.[472] If the purchaser's proxy concludes the purchase he shall be entitled to pre-emption.

ومن باع بشرط الخيار فلا شفعة للشفيع فإن أسقط الخيار وجبت الشفعة ومن اشترى بشرط الخيار وجبت الشفعة

If a person sells with the stipulation of an option, the pre-emptor shall not be entitled to pre-emption.[473] If he waives the option, pre-emption shall

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must be confirmed from the time of the sale until the time judgement is passed. When the pre-emptor dies, ownership passes to his heirs who were not the owners at the time of the sale.

[471] *Ḍamān al-darak* is an Arabic term that denotes a misrepresentation guarantee. It is a third-party's guarantee which secures refunding the price to the purchaser if the sold commodity is proven to be legally owned by a person other than the seller. In other words, the seller of a property is sometimes asked to provide a surety against any defect in the title of that property, by virtue of which, the purchaser has the right to rescind the contract and redeem his money. *Ḍamān al-darak* is also known as *ḍamān al-ʿuhda.*

[472] In both these situations the sale became complete through him as agent or surety and it is his obligation to hand over the property to the purchaser. He is therefore not allowed to disrupt such sale and betray his obligation by claiming pre-emption.

[473] As discussed in the chapter on the option of stipulation, if a person sells an item

become binding. If a person purchases with the stipulation of an option, pre-emption shall become binding.[474]

ومن ابتاع دارا شراء فاسدا فلا شفعة فيها فإن سقط الفسخ وجبت الشفعة

If a person purchases a house in an invalid sale, there shall be no pre-emption.[475] If the (right of) cancellation falls away pre-emption shall become binding.

وإذا اشترى ذمي دارا بخمر أو خنزير وشفيعها ذمي أخذها بمثل الخمر وقيمة الخنزير وإن كان شفيعها مسلما أخذها بقيمة الخمر والخنزير

If a *dhimmī* purchases a house in exchange for wine or pork and the pre-emptor is (also) a *dhimmī* he shall take it for the equivalent (quantity of) wine and the value of the pork.[476] If the pre-emptor is a Muslim he shall take it for the value[477] of the wine and the pork.

ولا شفعة في الهبة إلا أن تكون بعوض مشروط

There is no pre-emption in a gift unless it is in lieu of a stipulated exchange.

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with an option the item sold shall not leave the ownership of the seller.

[474] Purchasing with an option does not prevent the item of sale from leaving the ownership of the seller as discussed in the chapter on the option of stipulation.

[475] The Sharīʿa requires that an invalid sale be cancelled by the parties and granting the right of pre-emption will only affirm the invalidity by preventing the cancellation of the sale.

[476] *Ahl al-dhimma or dhimmīs* refer to non-Muslim subjects living in a Muslim country. As legal subjects of the law, the rules of the Sharīʿa relating to commercial transactions shall apply to non-Muslims just as they apply to Muslims with the specific exception of wine and pork as discussed in the chapter on the invalid sale.

[477] Since it is not legal for a Muslim to deal in wine he will have to pay the value (*qīma*) of the wine even though wine is a *mithlī* item.

وإذا اختلف الشفيع والمشتري في الثمن فالقول قول المشتري فإن أقاما البينة فالبينة بينة الشفيع عند أبي حنيفة ومحمد وإذا ادعى المشتري ثمنا أكثر وادعى البائع أقل منه ولم يقبض الثمن أخذها الشفيع بما قال البائع وكان ذلك حطا عن المشتري وإن كان قبض الثمن أخذها بما قال المشتري ولم يلتفت إلى قول البائع

If the pre-emptor and the purchaser differ with respect to the price the statement of the purchaser shall be accepted.[478] If both provide evidence the evidence of the pre-emptor shall be accepted according to Imām Abū Ḥanīfa and Imām Muḥammad.[479] If the purchaser claims a higher price and the seller claims lesser than that, without his having received the price, the pre-emptor shall take it for the price the seller stated and this shall be (deemed) a discount for the purchaser. If he had received the price the pre-emptor shall take it for the price stated by the purchaser and the statement of the seller shall not be given consideration.

وإذا حط البائع عن المشتري بعض الثمن سقط ذلك عن الشفيع وإن حط جميع الثمن لم يسقط عن الشفيع وإذا زاد المشتري البائع في الثمن لم تلزم الزيادة الشفيع

If the seller drops off part of the price for the purchaser the same shall fall away for the pre-emptor. If he drops off the entire price it shall not fall away for the pre-emptor. If the purchaser increases the price for the seller the pre-emptor shall not be liable for the extra amount.[480]

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[478] Since the purchaser denies that the pre-emptor has the right to take the property for the lesser amount, his statement shall be accepted with his oath based on the established principle that the 'statement of the denier is accepted.'

[479] This is due to the fact that the purpose of evidence is to impose an obligation (*ilzām*) and the pre-emptor is the one obliging the purchaser to hand over the property for the lesser amount. On the other hand the evidence of the purchaser does not impose any obligation on the pre-emptor as he may simply withdraw his claim of pre-emption and opt not to take the property.

[480] Once the pre-emptor's right to take the property for the lesser amount is established the purchaser cannot do anything to affect this right.

وإذا اجتمع الشفعاء فالشفعة بينهم على عدد رؤوسهم ولا يعتبر اختلاف الأملاك

If there is more than one pre-emptor the pre-emption shall be (shared) amongst them according to the number of heads and the difference in ownership shall not be considered.[481]

ومن اشترى دارا بعرض أخذها الشفيع بقيمته
وإن اشتراها بمكيل أو موزون أخذها بمثله

If a person purchases a house in exchange for goods[482] the pre-emptor shall take it in exchange for the value thereof. If he purchases it in exchange for an item of measure or weight[483] the pre-emptor shall take it for the equivalent thereof.

وإذا باع عقارا بعقار أخذ الشفيع كل واحد منهما بقيمة الآخر

If a person sells one property in exchange for another, the pre-emptor (of each property) shall take each one of them in exchange for the value[484] of the other.

وإذا بلغ الشفيع أنها بيعت بألف فسلم ثم علم أنها بيعت بأقل
أو بحنطة أو شعير قيمتها ألف أو أكثر فتسليمه باطل وله الشفعة
وإن بان أنها بيعت بدنانير قيمتها ألف فلا شفعة له

[481] In other words, a partner with a lesser share will have the right to acquire as much as a partner with a greater share e.g. If there are three partners in a property who own one half, one third and one sixth respectively. If the partner who owns half sells his share, the other two partners will get the right of pre-emption equally i.e. each one of them will have the right to acquire half of the half that was sold i.e. one quarter.

[482] The word *ʿarḍ* refers to an item that does not have an equivalent (*mithl*) i.e. a non-fungible item.

[483] i.e. a fungible item

[484] Real estate properties are obviously non-fungible items.

If it reaches the pre-emptor that it was sold for one thousand (dirhams) and he relinquished (his right) and thereafter he learnt that it was sold for less or in exchange for wheat or barley, the value of which is one thousand or more, then his relinquishment shall be void and he shall be entitled to pre-emption.[485] If it becomes apparent that it was sold in exchange for dīnārs, the value of which is one thousand, then there shall be no pre-emption.[486]

وإذا قيل له إن المشتري فلان فسلم الشفعة ثم علم أنه غيره فله الشفعة

If it was said to him that the purchaser is so and so and he relinquished (his right) and thereafter he learnt that it was someone else he shall be entitled to pre-emption.

ومن اشترى دارا لغيره فهو الخصم في الشفعة إلا أن يسلمها إلى الموكل

If a person purchases a house (as a proxy) for someone else he shall be the respondent in the (case of) pre-emption[487] unless he hands it over to the principal.[488]

وإذا باع دارا إلا مقدار ذراع في طول الحد يلي الشفيع فلا شفعة له

When a person sells a property excluding the extent of one cubit along the boundary line adjoining the (property of the) pre-emptor, he shall not be entitled to pre-emption.[489]

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[485] It is assumed that he only relinquished his right due to the price being too high or due to his inability to pay the equivalent in that fungible commodity.

[486] Dīnārs and dirhams are deemed to be the same species in this instance as both are *thaman*.

[487] Taking a property on the basis of pre-emption is one of the obligations of the contract – for which the proxy is liable.

[488] Once he hands it over to the principal his mandate ends and he no longer has any control over the property.

[489] This is a legal ruse used to prevent a neighbour from becoming entitled to the right of pre-emption since the portion of land adjoining his property is not sold.

وإن ابتاع منها سهما بثمن ثم ابتاع بقيتها فالشفعة للجار في السهم الأول دون الثاني

If he purchases a share in it for a price and thereafter purchases the remainder the neighbour shall be entitled to pre-emption in the first share and not the second.[490]

وإذا ابتاعها بثمن ثم دفع إليه ثوبا عنه فالشفعة بالثمن دون الثوب

If he purchases it for a price and thereafter gives a garment in place of it the pre-emption shall be for the price and not the garment.[491]

ولا تكره الحيلة في إسقاط الشفعة عند أبي يوسف وتكره عند محمد

According to Imām Abū Yūsuf, a legal ruse to drop off pre-emption shall not be disliked.[492] According to Imām Muḥammad it shall be disliked.

وإذا بنى المشتري أو غرس ثم قضي للشفيع بالشفعة فهو بالخيار إن شاء أخذها بالثمن وقيمة البناء والغرس مقلوعا وإن شاء كلف المشتري قلعه وإذا أخذها الشفيع فبنى أو غرس ثم استحقت رجع بالثمن ولا يرجع بقيمة البناء والغرس

If the purchaser builds (a building) or plants (a tree plantation) and thereafter judgement for pre-emption is passed in favour of the pre-emptor, he shall have an option: If he wishes he may take it for the price plus the

[490] This is another legal ruse used to prevent a neighbour from claiming the right of pre-emption since he will only be entitled to pre-emption in the first share. In the sale of the second share the purchaser of the first share, as joint-owner in the property, will have first right to exercise the right of pre-emption.

[491] This is a legal ruse that could be used to prevent a partner or neighbour from claiming the right of pre-emption as the property may be sold for a price that is much higher than its market value and thereafter a garment (or cloth) equivalent to the market value of the property may be taken in exchange for the purchase amount. The exchange of the purchase amount for the garment is a separate transaction and the pre-emption is not linked to it.

[492] This applies as long as the legal ruse is applied prior to the right of pre-emption being established. Once the right of pre-emption is established both Imāms are of the view that any legal ruse to defeat such right is disliked.

value of the building or plantation razed or if he wishes he may require the purchaser to remove the same. If the pre-emptor takes it and builds or plants on it and thereafter a third party becomes entitled to it, he shall claim the price (only) and not the value of the building or plantation.[493]

وإذا انهدمت الدار أو احترق بناؤها أو جف شجر البستان بغير فعل أحد فالشفيع بالخيار إن شاء أخذها بجميع الثمن وإن شاء ترك وإن نقض المشتري البناء قيل للشفيع إن شئت فخذ العرصة بحصتها وإن شئت فدع وليس له أن يأخذ النقض

When the house collapses or its structure burns down, or the trees in the orchard dry up without the action of anyone the pre-emptor shall have the option: If he wishes he may take it for the full price[494] and if he wishes he may leave it. If the purchaser demolishes the structure the pre-emptor shall be told, 'If you wish you may take the land for its portion (of the price) or if you wish leave it.' He shall not have the right to take the rubble.[495]

ومن ابتاع أرضا وعلى نخلها ثمر أخذها الشفيع بثمرها فإن أخذها المشتري سقط عن الشفيع حصته

If a person purchases land that has fruit on its date-palms the pre-emptor shall take it with the fruit.[496] If the purchaser takes the fruit, its portion (of

[493] The difference between this case and the case of a normal purchase and sale transaction, in which the purchaser may claim the value of the building or the plantation from the seller in the event of entitlement (*istiḥqāq*), is that in the case of pre-emption the property was taken from the purchaser forcefully and the purchaser did not give any warranty to the pre-emptor with respect to title in the property, whereas in a purchase and sale transaction the seller implicitly gives such warranty to the purchaser and is therefore held liable in the event of entitlement.

[494] Since the building or trees are ancillary in the sale of the property no part of the purchase amount is allocated to them unless they are purposefully destroyed by the purchaser, in which case a part of the purchase of the purchase price will fall away.

[495] Since the rubble is no longer permanently attached to the property it is not deemed to be ancillary to it any longer.

[496] This is due to the fact that the fruit are attached to the property and is based on

the price) shall fall away from the pre-emptor.

وإذا قضي للشفيع بالدار ولم يكن رآها فله خيار الرؤية
وإن وجد بها عيبا فله أن يردها به وإن كان المشتري شرط البراءة منه

If judgement for the house is passed in favour of the pre-emptor and he had not seen house he shall have the on sight option.[497] If he finds a defect in it, he shall have the right to return it even if the purchaser had stipulated freedom (of liability) from that defect.[498]

وإذا ابتاع بثمن مؤجل فالشفيع بالخيار إن شاء أخذها بثمن حال
وإن شاء صبر حتى ينقضي الأجل ثم يأخذها

If a person purchases for a deferred price, the pre-emptor shall have an option: If he wishes he can take it for a cash price and if he wishes he can wait until the term ends and then take it.[499]

وإذا قسم الشركاء العقار فلا شفعة لجارهم بالقسمة

If partners divide immovable property their neighbour shall not be entitled to pre-emption on account of the division.[500]

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istiḥsān since fruit are not deemed ancillary in the sale of a property and only enter into the sale if explicitly mentioned.

[497] As discussed earlier in this chapter, taking a property on the basis of pre-emption is tantamount to purchasing it and gives the purchaser the options that he is entitled to in a purchase and sale transaction.

[498] The agreement by the purchaser to forego his option of defect does not impact on the pre-emptor's entitlement to that option.

[499] In this case the pre-emptor shall not have the option of taking the property immediately and paying later as this was a contract term agreed to by the seller in the agreement with the purchaser only and will not apply in the case of the pre-emptor.

[500] Division of a property amongst its joint-owners, although considered to be a form of mutual exchange in some respects, is not a commutative contract in all respects as it entails an element of partition in kind.

وإذا اشترى دارا فسلم الشفيع الشفعة ثم ردها المشتري بخيار رؤية أو شرط أو عيب بقضاء قاض فلا شفعة للشفيع وإن ردها بغير قضاء أو تقايلا فللشفيع الشفعة

If a person purchases a property and the pre-emptor relinquishes the (right of) pre-emption and thereafter the purchaser returns it on the basis of the on sight option, (the option of) stipulation or (the option of) defect with the judgment of a Qāḍī the pre-emptor shall not be entitled to pre-emption.[501] If he returns it without a judgement or (if) they mutually cancel (the sale) the pre-emptor shall be entitled to pre-emption.[502]

[501] As discussed in the relevant chapters, when a transaction is reversed on these bases it is deemed as if the sale did not take place at all.

[502] As discussed in the chapter on the option of defect and the chapter on cancellation, if the item is taken back by the seller without a court order the cancellation applies only to the contracting parties and the transaction is deemed to be a new sale with respect to any third party. The pre-emptor in this instance is a third party.

كتاب الشركة
Chapter: *Sharika* (Partnership)

الشركة على ضربين شركة أملاك وشركة عقود

There are two types of *sharika*: co-ownership and contracted partnership.

فشركة الأملاك العين يرثها رجلان أو يشتريانها فلا يجوز لأحدهما أن يتصرف
في نصيب الآخر إلا بإذنه وكل واحد منهما في نصيب صاحبه كالأجنبي

'Co-ownership' is (for example when) an article is inherited or purchased by two people.[503] Neither of them may transact in the share of the other except with his consent. Each one of them is like a stranger with respect to the share of the other.[504]

والضرب الثاني شركة العقود وهي على أربعة أوجه مفاوضة وعنان
وشركة الصنائع وشركة الوجوه

The second type is 'contracted partnership'[505] and is of four types: *mufāwaḍa, ʿinān,* the professional partnership and the reputational partnership.

[503] In other words, the item comes into their joint-ownership irrespective of whether this occurs voluntarily or involuntarily.

[504] Transacting in the wealth of another person requires consent (as in the case of an agent) or authority (as in the case of a guardian.) This type of partnership does not include *wakāla* and therefore each partner cannot transact in the other's share.

[505] This type of partnership occurs by means of a contract consisting of an offer and acceptance.

فأما شركة المفاوضة فهي أن يشترك الرجلان فيستويان في مالهما وتصرفهما ودينهما
فتجوز بين الحرين المسلمين العاقلين البالغين ولا تجوز بين الحر والمملوك
ولا بين الصبي والبالغ ولا بين المسلم والكافر

The *mufāwaḍa* partnership[506] is a partnership between two people who are equal in their wealth, transactional competence and religion. It may thus be contracted between two free, rational, adult Muslims but may not be contracted between a free person and a slave nor between a minor and an adult and nor between a Muslim and a disbeliever.

وتنعقد على الوكالة والكفالة

It is contracted on the basis of *wakāla* (agency) and *kafāla* (suretyship.)[507]

وما يشتريه كل واحد منهما يكون على الشركة إلا طعام أهله وكسوتهم
وما يلزم كل واحد منهما من الديون بدلا عما يصح فيه الاشتراك فالآخر ضامن له
فإن ورث أحدهما مالا تصح فيه الشركة أو وهب له ووصل إلى يده
بطلت المفاوضة وصارت الشركة عنانا

Whatever each one of them purchases shall be for the partnership - with the exception of the food and clothing of his family. Any debt that any one of them becomes liable for in lieu of that in which partnership is valid, the

[506] The *mufāwaḍa* is a form of universal or unlimited investment partnership in which the partners enjoy complete equality in all respects viz. capital, personal status, management and right of disposal. All of the partners' eligible property is incorporated into the social capital. In other words, the partners must contribute all of their wealth to the partnership which means that none of them must be richer than the other.

[507] The *mufāwaḍa* partnership incorporates the contracts of *wakāla* (agency) and *kafāla* (suretyship) by virtue of which each partner will become the agent and surety for the other. He therefore will be able to transact in his share as well as that of his partner and will also be liable for any debt incurred by him or his partner.

other person shall also become liable for the same.[508] If any one of them inherits wealth in which partnership is valid or receives such wealth as a gift that comes into his hand, the *mufāwaḍa* shall become void[509] and the partnership shall become *ʿinān.*

ولا تنعقد الشركة إلا بالدراهم والدنانير والفلوس النافقة ولا تجوز بما سوى ذلك إلا أن يتعامل الناس بها كالتبر والنقرة فتصح الشركة بهما وإذا أرادا الشركة بالعروض باع كل واحد منهما نصف ماله بنصف مال الآخر ثم عقدا الشركة

Partnership shall only be contracted with *dirhams*, *dīnārs* and *fulūs* that are in currency.[510] It shall not be valid with anything besides these unless people deal with them, such as gold and silver nuggets, in which case partnership with them shall be valid. When they wish to contract a partnership using (tangible) goods each one of them shall sell half his wealth in exchange for half the wealth of the other person.[511] Thereafter they shall enter into a contract of partnership.[512]

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[508] This is on the basis of the *kafāla* (suretyship) that is contained within the *mufāwaḍa* contract.

[509] Equality in wealth is a requirement for the validity of a *mufāwaḍa* contract of partnership at inception as well as during the course of the contract. Once this equality is lost the *mufāwaḍa* contract becomes void and the partnership becomes of the *ʿinān* type, in which equality is not a requirement.

[510] In today's times this will include modern currencies. In other words the Ḥanafī view is that the capital in partnership contracts must be currency and may not be tangible goods. This is because *dirhams*, *dīnārs*, *fulūs* and currency do not become specific in a purchase and sale transaction and it is therefore possible for each of the partners to conclude a purchase on behalf of the partnership thereby validating the profit for both partners as it will be profit earned based on their joint liability.

[511] Once this is done they will become equal joint owners in those goods (co-ownership) but will still not have the right to transact in each other's share.

[512] Once they enter into a contract of partnership this will include *wakāla* and each partner may then transact in the entire goods on behalf of both of them.

وأما الشركة العنان فتنعقد على الوكالة دون الكفالة ويصح التفاضل في المال ويصح أن يتساويا في المال ويتفاضلا في الربح ويجوز أن يعقدها كل واحد منهما ببعض ماله دون بعض ولا تصح إلا بما بينا أن المفاوضة تصح به

The *ʿinān* partnership shall be contracted on the basis of *wakāla* (agency) and not *kafāla* (suretyship.)[513] Disparity in wealth (i.e. capital contribution of the partners) shall be valid. It shall also be valid if the partners are equal in wealth (capital contribution) but share the profit unequally.[514] Each partner may enter into the contract of partnership with part of his wealth only.[515] It shall only be valid with what we have explained that *mufāwaḍa* is valid with.[516]

ويجوز أن يشتركا ومن جهة أحدهما دراهم ومن جهة الآخر دنانير وما اشتراه كل واحد منهما للشركة طولب بثمنه دون الآخر ثم يرجع على شريكه بحصته منه

They may enter into the partnership with dirhams from the side of one of them and dīnārs from the other. The price for whatever each of them purchases for the partnership shall be demanded from him and not the other partner.[517] He shall thereafter claim his partner's portion thereof from him.[518]

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[513] This is in contrast to the *mufāwaḍa* partnership. Each partner in the *ʿinān* partnership will therefore be able to transact in his share as well as that of his partner but will not be liable for any debt incurred by his partner.

[514] In the *mufāwaḍa* partnership profit has to be shared equally.

[515] In the *mufāwaḍa* partnership each partner has to enter into the partnership with all of his wealth.

[516] This refers to the *dirhams*, *dīnārs* and *fulūs* that are in currency or the gold and silver nuggets that people transact with, as referred to previously.

[517] As agent (*wakīl*) he will be liable for the obligations of the contract and the other partner will not be liable as the *ʿinān* partnership does not include *kafāla*.

[518] Since he acted as agent on behalf of his partner for the purchase of his partner's portion he may claim the amount paid on his behalf from his own funds.

وإذا هلك مال الشركة أو أحد المالين قبل أن يشتريا شيئا بطلت الشركة
وإن اشترى أحدهما بماله وهلك مال الآخر قبل الشراء فالمشترى بينهما على ما شرطا
ويرجع على شريكه بحصته من ثمنه

When the wealth of the partnership or one of the two wealths becomes destroyed before they purchase anything the partnership shall become void. If one of them purchases (something) with his wealth and the wealth of the other becomes destroyed before (he could complete any) purchase, the purchased item shall be (shared) between them[519] as they had stipulated and he[520] shall claim from his partner his portion of the price.

وتجوز الشركة وإن لم يخلطا المالين

Partnership shall be valid even if they do not mix their wealth.[521]

ولا تصح الشركة إذا شرطا لأحدهما دارهم مسماة من الربح

Partnership shall not be valid if they stipulate that one of them shall receive a specified number of dirhams from the profit.[522]

ولكل واحد من المتفاوضين وشريكي العنان أن يبضع المال ويدفعه مضاربة
ويوكل من يتصرف فيه ويده في المال يد أمانة

Each one of the partners in a *mufāwaḍa* or *ʿinān* partnership may invest the funds on the basis of *biḍāʿa* [523]or *muḍāraba* or appoint someone to transact in

[519] This is because he had purchased for the partnership and therefore the ownership of the purchased item passed to both partners at the time of purchase.
[520] i.e. the partner who purchased.
[521] Partnership is based on the contract agreed to between the parties and not the wealth.
[522] Such a stipulation may result in there being no sharing of profit, as is the case when the profit generated is equal to or less than the specified amount, and shall therefore not be valid.
[523] *Biḍāʿa* refers to handing funds (or assets) over to someone else to trade with and

it. The funds shall be held by him in a fiduciary capacity.

وأما شركة الصنائع فالخياطان والصباغان يشتركان على أن يتقبلا الأعمال
ويكون الكسب بينهما فيجوز ذلك وما يتقبله كل واحد منهما من العمل يلزمه
ويلزم شريكه فإن عمل أحدهما دون الآخر فالكسب بينهما نصفان

The professional partnership[524] is when two tailors or dyers form a partnership on the basis that they will accept work and the earnings (therefrom) will be (shared) between them. Such a transaction shall be valid and any work each one of them accepts shall be binding on him as well as his partner. If only one of them does the work the amount earned shall be (shared) between them equally.

وأما شركة الوجوه فالرجلان يشتركان ولا مال لهما على أن يشتريا بوجوههما ويبيعا
فتصح الشركة على هذا وكل واحد منهما وكيل الآخر فيما يشتريه
فإن شرطا أن يكون المشترى بينهما نصفين فالربح كذلك ولا يجوز أن يتفاضلا فيه
وإن شرطا أن يكون المشترى بينهما أثلاثا فالربح كذلك

The reputational partnership[525] is when two persons form a partnership without any funds on the basis that they will purchase based on their reputation[526] and sell. The partnership shall be valid on this basis and each one of them shall be a proxy for the other in whatever he purchases. If they stipulate that the item purchased shall be (shared) between them equally the profit shall also be likewise and they may not (agree to) share the profit unequally.[527] If they stipulate that the item purchased shall be (shared)

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return the capital amount together with the full profit without taking a share thereof.

[524] *Sharikat al-ṣanāʾiʿ* is also known as *sharikat al-taqabbul, sharikat al-aʿmāl* or *sharikat al-abdān*.

[525] It is known as *sharikat al-wujūh* (the reputational partnership) because only a person with a good reputation is able to purchase on credit.

[526] This refers to purchasing on credit.

[527] Entitlement to profit may be based on capital, labour or liability. Th profit in this

between them in thirds[528] the profit shall be likewise.

ولا تجوز الشركة في الاحتطاب والاحتشاش والاصطياد
وما اصطاده كل واحد منهما أو احتطبه فهو له دون صاحبه

Partnership in collecting wood, gathering grass or hunting[529] shall not be valid. Whatever each one of them hunts or collects shall belong to him (only) and not his associate.

وإذا اشتركا ولأحدهما بغل وللآخر رواية يستقي عليها الماء والكسب بينهما
لم تصح الشركة والكسب كله للذي استقى وعليه أجر مثل الراوية إن كان صاحب البغل
وإن كان صاحب الراية فعليه أجر مثل البغل

If two people form a partnership in which one of them has a mule and the other a water bag with which he will draw water and the earnings will be shared between them, the partnership shall not be valid.[530] The full earnings shall belong to the one who drew the water and he shall be liable to pay the market rental[531] for the water bag if he was the owner of the mule. If he was the owner of the water bag he shall be liable for the market rental of the mule.

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type of partnership, where there is no capital or labour, is based only on liability which is in proportion to ownership of the item purchased. Thus any additional profit will be profit without liability which is not allowed in Sharīʿa.

[528] i.e. two thirds for one partner and one third for the other.

[529] Partnership is not valid in collecting items that are permissible for and available to everyone (e.g. wood, grass, water etc.) since each of the partners already has the right to collect the item for himself.

[530] The partnership is not valid because water is something that is permissible for and available to everyone.

[531] Since he made use of the other person's item on the basis of an invalid contract the market rental becomes due.

وكل شركة فاسدة فالربح فيها على قدر المال ويبطل شرط التفاضل

When a partnership is invalid the profit shall be (distributed) in proportion to the capital and the stipulation of an unequal (distribution of profit) shall be void.[532]

وإذا مات أحد الشريكين أو ارتد ولحق بدار الحرب بطلت الشركة

When one of the two partners dies or turns renegade and flees to *dār al-ḥarb* the partnership shall become void.[533]

وليس لواحد من الشريكين أن يؤدي زكاة مال الأخر إلا بإذنه
فإن أذن كل واحد منهما لصاحبه أن يؤدي زكاته فأدى كل واحد منهما
فالثاني ضامن علم بأداء الأول أو لم يعلم

None of the partners shall have the right to discharge the *zakāh* of the other except with his consent.[534] If each of them grants consent to the other to discharge his *zakāh* and both of them discharge it, the second one (to discharge the *zakāh*) shall be liable, whether he was aware of the discharge by the first person or not.

[532] Since the partnership contract was invalid, the terms of the contract which stipulated how the profit will be distributed between the partners will be void and the profit will default to the original position of being in proportion to the capital invested.

[533] Once judgement is passed with respect to a person who abandons *dār al-islām* and flees to *dār al-ḥarb*, this is legally deemed to be the death of such person. As a result the partnership becomes invalid due to the *wakāla* contained within the partnership, which is an essential requirement for its validity, becoming invalid on the occurrence of the legal death.

[534] *Zakāh* is an act of worship and not a trading activity. It is therefore not included in the partnership.

كتاب المضاربة
Chapter: *Muḍāraba* (Silent Partnership)

المضاربة عقد على الشركة بمال من أحد الشريكين وعمل من الآخر

Muḍāraba is a contract of partnership[535] where capital is provided by one partner and work is provided by the other.

ولا تصح المضاربة إلا بالمال الذي بينا أن الشركة تصح به

Muḍāraba shall only be valid in that type of capital which we explained that *Sharika* (partnership) is valid in.[536]

ومن شرطها أن يكون الربح بينهما مشاعا لا يستحق أحدهما منه دراهم مسماة

One of the conditions of *muḍāraba* is that the profit be shared between the partners in common without any one of partners being entitled to a specified number of dirhams.

ولا بد أن يكون المال مسلما إلى المضارب ولا بد لرب المال فيه

It is necessary that the capital be handed over to the *muḍārib* without the provider of the capital having any control over it.[537]

[535] The partnership (sharing) is in the profit and not in the capital.

[536] This refers to the dirhams, dīnārs and *fulūs* that are in currency or the gold and silver nuggets that people deal with, referred to previously. In today's times this will also include modern currencies.

[537] The *muḍārib* must have control over the capital in order to be able to transact in it so as to generate a profit.

فإذا صحت المضاربة مطلقة جاز للمضارب أن يشتري ويبيع ويسافر ويبضع ويوكل وليس له أن يدفع المال مضاربة إلا أن يأذن له رب المال في ذلك

Once the *muḍāraba* is valid in an unrestricted manner, the *muḍārib* shall be permitted to buy, sell, travel, invest *on biḍāʿa*[538] and appoint agents.[539] He shall not have the right to invest on a *muḍāraba* basis[540] unless the capital provider permitted him to do so.

وإن خص له رب المال التصرف في بلد بعينه أو في سلعة بعينها لم يجز له أن يتجاوز ذلك وكذلك إن وقت للمضاربة مدة بعينها جاز وبطل العقد بمضيها

If the capital provider specifies trading in a specific city or commodity, the *muḍārib* shall not be permitted to go beyond such stipulation.[541] Likewise, if he fixes a time period for the *muḍāraba*, it shall be valid and the contract shall become void once such period elapses.

[538] *Biḍāʿa* refers to handing funds (or assets) over to someone else to trade with and return the capital amount together with the full profit without taking a share thereof.

[539] The *muḍārib* is allowed to transact in the normally acceptable manner in which traders transact. This includes the types of transactions mentioned in the text.

[540] A contract cannot incorporate another contract that is of a higher or similar status.

[541] The contract of *muḍāraba* is based on *wakāla* and the capital provider therefore has the right to apply restrictions that are appropriate e.g. restricting the place or period of trading or restricting the commodity which may be traded.

وليس للمضارب أن يشتري أبا رب المال ولا ابنه ولا من يعتق عليه فإن اشتراهم كان
مشتريا لنفسه دون المضاربة وإن كان في المال ربح فليس له أن يشتري من يعتق عليه
فإن اشتراهم ضمن مال المضاربة وإن لم يكن في المال ربح جاز أن يشتريهم
فإن زادت قيمتهم عتق نصيبه منهم ولم يضمن لرب المال شيئا
ويسعى المعتق لرب المال في قيمة نصيبه منه

The *muḍārib* shall not be permitted to purchase the father of the capital provider, nor his son, nor any other person who becomes free when the capital provider acquires ownership of them. If he does purchase any of such persons he shall be purchasing (them) for himself and not for the *Muḍāraba*.[542] If there is a profit in the (*Muḍāraba*) capital then the *muḍārib* shall not be permitted to purchase any such person that will become free when he acquires ownership of them.[543] If there is no profit in the (*Muḍāraba*) capital he may purchase them. However if their value appreciates, his portion in them shall become free and he shall not be liable[544] to the capital provider. The emancipated slave shall be made to work for the capital provider's benefit up to the value of his share in him.[545]

[542] Since the object of the *muḍāraba* is to make a profit the *muḍārib* has no mandate to purchase such persons as they will immediately become free if he purchases them with the funds of the capital provider.

[543] Since there is profit on the capital, the *muḍārib* is entitled to part of the total assets of the *muḍāraba*. If he uses these funds to purchase any slave he will become part owner of such slave and consequently his part will become free thereby causing the other part of the slave to also become impaired (as is the view of Imām Abū Ḥanīfa).

[544] The appreciation in the value of the slave was not on account of the *muḍārib's* action and he will therefore not be held liable.

[545] Since the *muḍārib* is not held liable there has to be some mechanism to compensate the capital provider for the loss. The slave, who is the ultimate beneficiary of the consequence of the appreciation in value in the form of his freedom, will be required to ensure that the capital provider is adequately compensated.

وإذا دفع المضارب المال مضاربة ولم يأذن له رب المال في ذلك لم يضمن بالدفع
ولا بتصرف المضارب الثاني حتى يربح فإذا ربح ضمن المضارب الأول المال

If the *muḍārib* hands over the funds on the basis of *Muḍāraba* without the permission of the capital provider he shall not become liable by the (mere) handing over nor by the second *muḍārib's* transacting until a profit is realized. When profit is realized the first *muḍārib* shall become liable.[546]

وإذا دفع إليه المال مضاربة بالنصف وأذن له أن يدفعها مضاربة فدفعها بالثلث
فإن كان رب المال قال له على أن ما رزق الله بيننا نصفان فلرب المال نصف الربح
وللمضارب الثاني ثلث الربح وللأول السدس وإن قال على أن ما رزقك الله بيننا نصفان
فللمضارب الثاني الثلث وما بقي بين رب المال والمضارب الأول نصفان
فإن قال له على أن ما رزق الله فلي نصفه فدفع المال إلى آخر مضاربة بالنصف
فللمضارب الثاني نصف الربح ولرب المال النصف ولا شيء للمضارب الأول
فإن شرط للمضارب الثاني ثلثي الربح فلرب المال نصف الربح وللمضارب الثاني
نصف الربح ويضمن المضارب الأول للمضارب الثاني سدس الربح من ماله

If the capital provider hands over the funds to the *muḍārib* on the basis of *muḍāraba*[547] for half the profit and permits him to hand it over on the basis of *muḍāraba* and the *muḍārib* thereafter hands it over for a third of the profit then the following shall apply:
-If the capital provider stated that "Whatever Allah provides will be between us in halves" then half of the profit shall be for the capital provider, a third for the second *muḍārib* and the remainder one sixth for the first *muḍārib*.

[546] In a *muḍāraba* the *muḍārib* is permitted to hand over the funds to a third party for safe-keeping (*wadīʿa*) or on the basis of *wakāla* or even *biḍāʿa*. Thus by the mere handing over or by the third party's transacting there is no liability on him. However once a profit is realized the third party becomes entitled to a share of this profit without the permission of the capital provider and therefore constitutes a breach of mandate resulting in liability on the part of the *muḍārib.*
[547]These rulings are quite straightforward and do not require any explanation.

-If the capital provider stated that "Whatever Allah provides you[548] will be between us in halves" then a third of the profit shall be for the second *muḍārib* and the remainder shall be shared between the capital provider and the *muḍārib* in halves.
If the capital provider stated: "Whatever Allah provides my share is half" and the *muḍārib* thereafter hands it over to a second *muḍārib* for half the profit, then the second *muḍārib* shall be entitled to half the profit and the capital provider shall be entitled to (the other) half, leaving the *muḍārib* with nothing. If (in the above case) the *muḍārib* had agreed to two thirds of the profit for the second *muḍārib*, then the capital provider shall be entitled to half the profit and the other half shall be for the second *muḍārib*. (In addition) the *muḍārib* shall be liable for a sixth[549] of the profit to the second *muḍārib* from his (own) funds.

وإذا مات رب المال أو المضارب بطلت المضاربة
وإن ارتد رب المال عن الإسلام ولحق بدار الحرب بطلت المضاربة

Once the capital provider or the *muḍārib* passes away the *muḍāraba* shall become void. If the capital provider turns renegade from Islam and flees to *dār al-ḥarb* the *muḍāraba* shall become void.

وإذا عزل رب المال المضارب ولم يعلم بعزله حتى اشترى وباع فتصرفه جائز
وإن علم بعزله والمال عروض فله أن يبيعها ولا يمنعه العزل من ذلك
ثم لا يجوز أن يشتري بثمنها شيئا آخر وإن عزله ورأس المال دراهم أو دنانير
قد نضت فليس له أن يتصرف فيه

If the capital provider dismisses the *muḍārib* without his knowledge - such that he purchases or sells then such transaction shall be valid.[550] If he comes

[548]The difference here is the addition of the word "you."
[549]To make up the two thirds agreed (half plus one sixth equals two thirds)
[550]As in the case of *wakāla*, knowledge is a precondition for the dismissal to take effect. Any transaction done by the *Muḍārib* prior to his being informed of the dismissal shall be valid for the *Muḍāraba*.

to know of the dismissal whilst the assets of the *muḍāraba* are in tangible form he shall have the right to sell them. The dismissal shall not preclude him from doing so.[551] Thereafter he may not use the funds realized by the sale to purchase any other item. If the capital provider dismisses him whilst the assets of the *muḍāraba* are dirhams or dīnārs in liquid form then the *muḍārib* may not transact in them.

وإذا افترقا وفي المال ديون وقد ربح المضارب فيه أجبره الحاكم على اقتضاء الديون وإن لم يكن له ربح لم يلزمه الاقتضاء ويقال له وكل رب المال في الاقتضاء

If the *muḍāraba* is terminated whilst there are (still) debts (i.e. receivables) in the assets (of the *muḍāraba*) and the *muḍārib* had made a profit in the transaction, he shall be obliged by the court to collect the outstanding debts.[552] If the *muḍārib* is not entitled to profit then collecting it shall not be binding[553] on him. In such a case he shall be instructed to grant proxy[554] to the capital provider to collect (the receivables).

[551]The *muḍārib* has the right to liquidate all the assets of the *Muḍāraba*, upon termination or dismissal, in order to realize profit based on the capital amount initially provided. Any excess on the capital amount is considered profit.

[552]The *muḍārib* in this case is entitled to a share in the outstanding amount and is therefore akin to an employee (*ajīr*).

[553] In such a case the *muḍārib* is akin to a proxy (*wakīl*) acting voluntarily and therefore cannot be obliged to do any action.

[554] Since the *muḍārib* was the actual contracting party in the transaction that gave rise to the debt only he will have the right to collect the debt. He therefore has to grant proxy to the capital provider in this case so that he is able to realize his rightful due.

وما هلك من مال المضاربة فهو من الربح دون رأس المال فإن زاد الهالك على الربح
فلا ضمان على المضارب فيه وإن كانا قد اقتسما الربح والمضاربة بحالها ثم هلك المال
أو بعضه ترادا الربح حتى يستوفي رب المال رأس المال فإن فضل بشيء كان بينهما
وإن عجز عن رأس المال لم يضمن المضارب وإن كانا قد اقتسما الربح
وفسخا المضاربة ثم عقداها فهلك المال لم يترادا الربح الأول

Any loss in the assets of the *muḍāraba* shall be deducted from the profit and not the capital.[555] If the loss exceeds the amount of profit the *muḍārib* shall not be held liable.[556] If the profit was distributed without terminating the *muḍāraba* and then a loss, of all or part of the assets, occurs the profit shall be recalled such that the capital provider recovers the capital. Any surplus shall be (distributed) between the parties. If the amount (recalled) is insufficient (to cover) the capital amount, the *muḍārib* shall not be held liable. If the profit was distributed after having terminated the *muḍāraba* and thereafter they re-contracted it, the initial profit shall not be recalled in the event of loss.[557]

ويجوز للمضارب أن يبيع بالنقد والنسيئة

The *muḍārib* shall be permitted to sell for cash or on credit.[558]

ولا يزوج عبدا ولا أمة من مال المضاربة

He may not marry off a slave-man or slave-girl from the *muḍāraba* assets.[559]

[555] Profit is whatever is in excess of the capital amount.

[556] The *muḍārib* acts in a fiduciary capacity (*amīn*) and therefore bears no liability except in cases of breach, misconduct or negligence.

[557] This is because this is a new *muḍāraba* that is unrelated to the first *muḍāraba* transaction.

[558]As stated previously, the *muḍārib* is allowed to do any transaction that is done in the normal course of business. Thus he is allowed to sell for cash as well as credit, as long as the credit period is a normally acceptable period in commercial practice.

[559]The act of marrying off slaves is not regarded to be a trading practice and therefore he is not allowed to do it according to Imām Abū Ḥanīfa and Imām Muḥammad.

كتاب الوكالة

Chapter: *Wakāla* (Agency[560])

كل عقد جاز أن يعقده الإنسان بنفسه جاز أن يوكل به غيره

Any contract that a person may conclude himself he may appoint someone else to conclude the same on his behalf.[561]

ويجوز التوكيل بالخصومة في سائر الحقوق وبإثباتها ويجوز التوكيل بالاستيفاء إلا في الحدود والقصاص فإن الوكالة لا تصح باستيفائهما مع غيبة الموكل عن المجلس

Appointment of a proxy (attorney) to represent one in a matter of dispute shall be valid for all types of rights[562] with respect to proving them. Appointment of a proxy for the collection of rights shall (also) be valid except in the case of *ḥudūd* (legal punishments) and *qiṣāṣ* (retaliation.) In these two cases it shall not be valid to appoint a proxy for their collection in the absence of the principal[563] (*muwakkil*.)

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[560] The Sharīʿa recognizes that a person, in some circumstances, will be unable to conclude a contract himself despite his being in need of doing so. It therefore grants him the right to appoint an agent or proxy.

[561] At the very outset of the chapter, Imām al-Qudūrī, lays down this guiding principle that determines in which contracts agency is valid.

[562] This includes commercial rights as well as rights related to legal punishments such as *ḥudūd* and *qiṣāṣ*.

[563] Since the general rule for *ḥudūd* and *qiṣāṣ* is that they fall away if there is an element of doubt, the principal (*muwakkil*) must be present at the time the punishment is meted out. In the absence of the principal the possibility of his having forgiven the guilty party (*ʿafw*) gives rise to an element of doubt since such *ʿafw* is recommended by the Sharīʿa.

وقال أبو حنيفة لا يجوز التوكيل بالخصومة إلا برضا الخصم
إلا أن يكون الموكل مريضا أو غائبا مسيرة ثلاثة أيام فصاعدا
وقال أبو يوسف ومحمد يجوز التوكيل بغير رضا الخصم

Imām Abū Ḥanīfa is of the view that the appointment of a proxy to represent one in a matter of dispute shall not be valid[564] without the consent of the opposing party unless the principal is ill or away at a distance of three days journey or more. According to Imām Abū Yūsuf and Imām Muḥammad it shall be valid to appoint an attorney without the consent of the opposing party.

ومن شرط الوكالة أن يكون الموكل ممن يملك التصرف وتلزمه الأحكام
والوكيل ممن يعقل العقد ويقصده وإذا وكل الحر البالغ أو المأذون مثلهما جاز
وإن وكلا صبيا محجورا يعقل البيع والشراء أو عبدا محجورا جاز
ولا تتعلق بهما الحقوق وتتعلق بموكليهما

One of the requirements of agency is that the principal must have the capacity to enter into transactions and be bound by its effects[565] and that the proxy (agent) understands[566] (the effect of) the contract and intends it. (Thus) if a free sane adult or a slave that is permitted to trade appoints another free sane adult or slave permitted to trade, the appointment shall be valid.[567] If they appoint a restricted minor, who understands purchase and sale, or a restricted slave, the appointment shall (also) be valid. However, in the latter case, the rights (of the contract entered into) shall

[564] The meaning of 'not valid' in this context is that it is not binding on the opposing party to accept to proceed against the proxy.
[565] The principal therefore cannot be a minor, an insane person or a restricted slave – all of whom do not possess the capacity to conclude transactions.
[566] It is not necessary that the agent possesses the capacity to conclude transactions in his own right. What is required is that the agent be of sound mind and of a discerning age. The agent cannot be a non-discerning minor or an insane person.
[567] The validity of the agency contract is based on the requirements stated above. Since the requirements are met the contract is valid.

not be linked to them (the minor or slave[568]) but shall be linked to the principal.

والعقود التي يعقدها الوكلاء على ضربين فكل عقد يضيفه الوكيل إلى نفسه مثل البيع
والإجارة فحقوق ذلك العقد تتعلق بالوكيل دون الموكل فيسلم المبيع ويقبض الثمن
ويطالب بالثمن إذا اشترى ويقبض المبيع ويخاصم بالعيب
وكل عقد يضيفه إلى موكله كالنكاح والخلع والصلح من دم العمد فإن حقوقه تتعلق
بالموكل دون الوكيل فلا يطالب وكيل الزوج بالمهر ولا يلزم وكيل المرأة تسليمها

Transactions that are effected by proxies are of two types:

1. Transactions that the proxy can attribute to himself, e.g. sale or lease contracts. In these contracts the rights associated with the contract shall be linked to the proxy and not the principal. Hence the proxy shall be liable for the delivery of the item of sale and collection of the payment. Likewise payment shall be demanded from him if he purchases, he shall take delivery of the item of sale and he shall be the disputant in case of a defect (in the item.)

2. Transactions that the proxy has to attribute to the principal e.g. marriage, *khulʿ* and settlement for intentional murder. In these contracts the rights associated with the contract shall be linked to the principal and not the proxy. Hence the proxy of the husband shall not be liable for the dowry and the proxy of the woman shall not be liable for her hand-over.

وإذا طالب الموكل المشتري فله أن يمنعه إياه فإن دفعه إليه جاز
ولم يكن للوكيل أن يطالبه به ثانيا

If the principal demands payment (of the purchase price) from the purchaser, he shall have the right to refuse to pay it over to him.[569] If he

[568] Since the minor is restricted for protection of his own interests and the slave is restricted for the protection of the master's interests, no liability can be attached to them. Hence, any liabilities arising from the contracts concluded by them will be linked directly to the principal.

hands it over to him it shall be valid[570]and the proxy shall not have the right to demand payment a second time.[571]

ومن وكل رجلا بشراء شيء فلا بد من تسمية جنسه وصفته أو جنسه ومبلغ ثمنه
إلا أن يوكله وكالة عامة فيقول ابتع لي ما رأيت

If a person appoints someone to purchase something it shall be necessary[572] that he mentions the species and type, or the species and purchase price, unless it is a general appointment in which he says, "Purchase for me whatever you like."

وإذا اشترى الوكيل وقبض المبيع ثم اطلع على عيب فله أن يرده بالعيب
ما دام المبيع في يده وإن سلمه إلى الموكل لم يرده إلا بإذنه

When the proxy purchases and takes possession of the item and thereafter discovers a defect (in the item) he may return it on the basis of the defect as

[569] Since the rights of the contract are linked to the proxy it is he who has the right to collect payment and not the principal.

[570] This is because the purchase sum is ultimately his.

[571] Demanding payment a second time is futile as it will mean that the purchaser will take back the amount from the principal to pay over to the proxy who will hand it over to the principal again.

[572] For the validity of the appointment of a person as proxy for the purchase of an item, the item to be purchased, if not specifically identified, must be reasonably defined without a considerable degree of ambiguity. If not, it will not be possible for the proxy to fulfil the mandate of his appointment. Mention of the species (e.g. slave) and type (e.g. Turkish) or the species and the price (e.g. 500 dirhams) reasonably defines the item although there is a slight degree of ambiguity with respect to the grade. This slight degree of ambiguity is accepted on the basis of *istiḥsān*, which gives consideration to the fact that the appointment of a proxy is based on creating ease for the principal. A detailed description of the desired item without any degree of ambiguity will create difficulty rather than ease for the principal. Thus there has to be tolerance for some degree of ambiguity.

long as the item is in his hands. Once he hands over the item to the principal he can only return the item to the seller if the principal consents.[573]

ويجوز التوكيل بعقد الصرف والسلم
فإن فارق الوكيل صاحبه قبل القبض بطل العقد ولا تعتبر مفارقة الموكل

It shall be valid to appoint a proxy to do a currency exchange (*ṣarf*) or forward sale (*salam*) contract. If the proxy separates from the counterparty before possession[574] the contract shall be void. The separation of the principal shall not be considered.

وإذا دفع الوكيل بالشراء الثمن من ماله وقبض المبيع فله أن يرجع به على الموكل
فإن هلك المبيع في يده قبل حبسه هلك من مال الموكل ولم يسقط الثمن
وله أن يحبسه حتى يستوفي الثمن فإن حبسه فهلك كان مضمونا ضمان الرهن
عند أبي يوسف وضمان المبيع عند محمد

When the proxy for purchase pays the purchase price from his own funds and takes possession of the article he shall have the right to claim this amount from the principal.[575] If the article is destroyed in the proxy's

[573] Once the proxy hands over the item to the principal he has completed his mandate and the *wakāla* terminates. He therefore has no right to return the article thereafter without the consent of the principal.

[574] As discussed in the relevant chapter, possession of both exchanges in the contract of *ṣarf* (currency exchange) and possession of the purchase price in *salam* (forward sale) is necessary before separation of the contracting parties occurs. Since the proxy is the actual contracting party the separation of the principal is immaterial.

[575] Even though the proxy had received no explicit instruction from the principal to make payment of the purchase price to the seller this instruction is deemed to be implicit in the agency. This is due to the fact that the principal is aware of the fact that the seller may demand payment prior to releasing the item of sale. Accordingly, the proxy shall have a right of recourse to the principal if he makes payment from his own funds.

possession prior to his withholding it the loss shall be that of the principal and the purchase price shall still be payable (to the proxy.)
The proxy (nevertheless) shall have the right to withhold the item (from the principal) until he receives the purchase amount.[576] If he withholds the item and it gets destroyed he shall be liable as per the liability of a pledge (*rahn*)[577] according to Imām Abū Yūsuf and as per the liability of an item of sale (*mabīʿ*) according to Imām Muḥammad.

وإذا وكل رجلين فليس لأحدهما أن يتصرف فيما وكلا فيه دون الآخر إلا أن يوكلهما بالخصومة أو بطلاق زوجته بغير عوض أو برد وديعة عنده أو بقضاء دين عليه

If a person appoints two proxies none of them may transact in the matter for which they were appointed without the other,[578] except when they are appointed to dispute[579] a court case, or to divorce his wife without compensation, or to return an item[580] deposited with him or to settle a debt due on him.

[576] Just as a seller has the right to withhold the item of sale from the purchaser until the purchase price is paid up in full, the proxy has a similar right against the principal. When he exercises this right, however, he becomes liable for the item.
[577] The proxy is liable for the lesser value of the purchase amount or the market value of the item according to Imām Abū Yūsuf, as is the case in a pledge. Hence, if the market value is lesser he will have the right to claim the difference between the market value and purchase price from the principal according to him. According to Imām Muḥammad he will be liable up to the purchase amount i.e. he will not have the right to claim any amount from the principal.
[578] The principal's appointment of two proxies is clear indication that he requires the judgement of both proxies when the transaction is executed. Thus both proxies must act together. However there are some exceptions to this rule as mentioned in the text.
[579] Representation by two attorneys in court is not possible as this can disrupt the legal proceedings. It will therefore be valid for one proxy to act without the other.
[580] In these instances there is no judgement required as the proxy is merely communicating or delivering something on behalf of the principal.

وليس للوكيل أن يوكل فيما وكل به إلا أن يأذن له الموكل أو يقول له اعمل برأيك
فإن وكل بغير إذن موكله فعقد وكيله بحضرته جاز
وإن عقد بغير حضرته فأجازه الوكيل الأول جاز

The proxy shall not have the right to appoint another proxy[581] unless the principal allows him to do so or says to him, 'Do as you wish.' If he appoints (another proxy) without the permission of the principal and the second proxy transacts in the presence of the first it shall be valid. If he transacts in his absence and he allows it, it shall also be valid.

وللموكل أن يعزل الوكيل عن الوكالة
فإن لم يبلغه العزل فهو على وكالته وتصرفه جائز حتى يعلم

The principal shall have the right to dismiss the proxy from the agency. If the news of the dismissal does not reach him he shall remain a proxy and any transaction he does shall be valid.[582]

وتبطل الوكالة بموت الموكل وجنونه جنونا مطبقا ولحاقه بدار الحرب مرتدا

Agency shall become void upon the death of the principal or if he loses his sanity permanently or flees to *dār al-ḥarb* as an apostate.

وإذا وكل المكاتب ثم عجز أو المأذون فحجر عليه أو الشريكان فافترقا
فهذه الوجوه تبطل الوكالة علم الوكيل أو لم يعلم

If a *mukātab* slave or a permitted (*maʾdhūn*) slave appoints a proxy and thereafter the *mukātab* cancels his contract (of *kitāba)* or the *maʾdhūn* slave is interdicted; or if two partners dissolve their partnership – in all such cases

[581] As discussed previously, a contract cannot incorporate another contract that is of a higher or similar status.

[582] The principal has the right to dismiss the proxy whenever he wishes as the agency is his prerogative. However the dismissal will only take effect once news of the dismissal reaches the proxy in an acceptable manner by transmission of one upright person or two persons.

the agency shall become void whether the proxy is aware of the occurrence (of such event) or not.[583]

وإذا مات الوكيل أو جن جنونا مطبقا بطلت وكالته
وإن لحق بدار الحرب مرتدا لم يجز له التصرف إلا أن يعود مسلما

If the agent passes away or loses his sanity permanently the agency shall become void.[584] If the agent flees to *dār al-ḥarb* as an apostate, his transactions shall not be valid unless he returns (to *dār al-Islām*) as a Muslim.

ومن وكل آخر بشيء ثم تصرف فيما وكل به بطلت الوكالة

If a person appoints someone to carry out a certain transaction and thereafter carries out that transaction himself the agency shall become void.

والوكيل بالبيع والشراء لا يجوز أن يعقد عند أبي حنيفة مع أبيه وجده
وولده وولد ولده وزوجته وعبده ومكاتبه
وقال أبو يوسف ومحمد يجوز بيعه منهم بمثل القيمة إلا في عبده ومكاتبه

A proxy for sale or purchase may not enter into a contract, according to Imām Abū Ḥanīfa, with his father, grandfather, child, grandchild, wife, slave or *mukātab* slave.[585] According to Imām Abū Yūsuf and Imām Muḥammad he

[583] In order for agency to remain valid the principal needs to remain in a position where he has authority to delegate. Upon occurrence of these events he loses this authority and it constitutes a constructive dismissal. Since this is a constructive dismissal (rather than a voluntary dismissal) it is not a prerequisite for the dismissal to take effect that news of the same reaches the proxy.

[584] This is because in such a case the agent loses his capacity to transact.

[585] According to Imām Abū Ḥanīfa, a proxy in an unrestricted agency may contract with anyone as long as there is no conflict of interest. In his contracting with close family (e.g. his father, grandfather etc.) the suspicion of there being a conflict of interest exists. This is because the Sharīʿa has deemed the testimony of such individuals in a court of law in favour of their relative as inadmissible. In addition,

may[586] to sell to them in exchange for the market value (of the item) with the exception of the slave and *mukātab* slave.

والوكيل بالبيع يجوز بيعه بالقليل والكثير عند أبي حنيفة وقال أبو يوسف ومحمد
لا يجوز بيعه بنقصان لا يتغابن الناس في مثله والوكيل بالشراء يجوز عقده بمثل القيمة
وزيادة يتغابن الناس في مثلها ولا يجوز بما لا يتغابن الناس في مثله
والذي لا يتغابن الناس فيه ما لا يدخل تحت تقويم المقومين

A proxy for the sale of an item may sell the item for (any amount, however) little or much, according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad he may not sell for a loss that people do not normally tolerate in such a sale.[587]

A proxy for the purchase of an item may purchase for the market value and for higher than the market value to the extent that people normally tolerate in such a transaction. However he may not purchase for a price higher than the market value to the extent that people do not (normally) tolerate.[588] The

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due to the close relationship between them, there is an overlap of benefits in their possessions.

[586] Imām Abū Yūsuf and Imām Muḥammad are of the view that since the sale is for the market value (and not less) and due to the fact that the ownership rights of relatives, despite their closeness, are distinct from each other, it is permitted for the proxy to sell to them. A slave and *mukātab*, however, must be excluded, as the master owns the slave and has a right in the earnings of the *mukātab* and a sale to either of these two will effectively amount to a sale of the proxy to himself.

[587] Since the agency was unrestricted, the proxy - according to Imām Abū Ḥanīfa - may sell for any amount. According to Imām Abū Yūsuf and Imām Muḥammad, even though the agency was not explicitly restricted, it is automatically and implicitly restricted by customary practice. This precludes his selling an item for considerably less than the market value. A slight decrease in the market value is tolerated.

[588] If the proxy purchases an item for a price that is significantly higher than the market value of the item, this transaction cannot be forced onto the principal. This is due to there being an element of suspicion that the proxy could have purchased the item for himself and after realizing that the transaction was concluded on a price much higher than the market value, attempted to pass it on to the principal.

definition of that which people do not normally tolerate is an amount that is not within (the range of) the valuation of valuators.

وإذا ضمن الوكيل بالبيع الثمن عن المبتاع فضمانه باطل

If the proxy for the sale of an item stands surety for the purchase price on behalf of the purchaser[589] such suretyship shall be void.

وإذا وكله ببيع عبده فباع نصفه جاز عند أبي حنيفة

وإن وكله بشراء عبد فاشترى نصفه فالشراء موقوف فإن اشترى باقية لزم الموكل

If a person is appointed to sell the slave of someone and he sells half the slave, it shall be valid according to Imām Abū Ḥanīfa.[590] If he is appointed to purchase a slave and he purchases half, the transaction shall be pending: if he purchases the other half it shall become binding on the principal.[591]

وإذا وكله بشراء عشرة أرطال لحم بدرهم فاشترى عشرين رطلا بدرهم من لحم يباع مثله

عشرة بدرهم لزم الموكل منه عشرة أرطال بنصف درهم عند أبي حنيفة

وقال أبو يوسف ومحمد يلزمه العشرون

وإذا وكله بشراء شيء بعينه فليس له أن يشتريه لنفسه

If a person is appointed to purchase 10 *raṭls*[592] of meat for 1 dirham and he purchases 20 *raṭls* for 1 dirham of meat that is (normally) sold at a price of ten *raṭls* for one dirham, only 10 *raṭls* for half a dirham shall be binding on

[589] In principle, the proxy acts in a fiduciary capacity and is not liable for the purchase price. If he stands surety this will render him liable and negate the principle of agency.

[590] Since the appointment was unqualified the sale of half will be valid according to Imām Abū Ḥanīfa.

[591] Sometimes, the purchase of half a slave may be necessary as a means to acquiring the full slave such as the case when a slave is inherited or owned by two or more people. The transaction will therefore be pending until this becomes clear.

[592] The *raṭls* or *riṭl* was a popular measure of weight equivalent to about 407.695g, which was half a *mann*. (*Muʿjam Lughat al-Fuqahāʾ*)

the principal according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad the (full) twenty *raṭls* shall be binding on the principal.

وإن وكله بشراء عبد بغير عينه فاشترى عبدا فهو للوكيل
إلا أن يقول نويت الشراء للموكل أو يشتريه بمال الموكل

If a person is appointed to purchase a specific item he shall not have the right to purchase that item[593] for himself. If a person is appointed to purchase a non-specific slave and he (subsequently) purchases a slave this shall be for the proxy[594] unless he states that he intended this purchase for the principal or he purchases it with the funds of the principal.[595]

والوكيل بالخصومة وكيل بالقبض عند أبي حنيفة و أبي يوسف و محمد
والوكيل بقبض الدين وكيل بالخصومة فيه عند أبي حنيفة

A proxy for disputing a case (an attorney on behalf of the claimant) shall also be the proxy for collection (of the claim) according to Imām Abū Ḥanīfa, Imām Abū Yūsuf and Imām Muḥammad.[596] A proxy for collection of a debt shall be the proxy for the dispute relating to that debt according to Imām Abū Ḥanīfa.

[593] This will be misleading the principal who assumed that the purchase will be completed for his benefit.

[594] The proxy retains his right to purchase items for his own benefit

[595] In order to confirm that the purchase was for the principal there must be clear indication either by the proxy stating his intention or using the funds of the principal for the purchase.

[596] This is according to all three Imāms contrary to Imām Zufar who is of the view that the principal was only satisfied with the proxy for disputing the case and not for collection of the claim. The other three Imāms, however, regard the collection of the debt as part of the completion of the process of establishing the claim.

وإذا أقر الوكيل بالخصومة على موكله عند القاضي جاز إقراره
ولا يجوز إقراره عليه عند غير القاضي عند أبي حنيفة و محمد
إلا أنه يخرج من الخصومة وقال أبو يوسف يجوز إقراره عليه عند غير القاضي

If the proxy for a dispute makes an acknowledgement (of the debt) against his principal before the judge, this acknowledgement shall be valid. If the acknowledgement is made other than before the judge, it shall not be valid according to Imām Abū Ḥanīfa and Imām Muḥammad. However in such a case the proxy shall be removed from the case. According to Imām Abū Yūsuf his acknowledgement other than before the judge shall be valid.

ومن ادعى أنه وكيل الغائب في قبض دينه فصدقه الغريم أمر بتسليم الدين إليه
فإن حضر الغائب فصدقه وإلا دفع إليه الغريم الدين ثانيا ورجع به على الوكيل
إن كان باقيا في يده وإن قال إني وكيل بقبض الوديعة فصدقه المودع
لم يؤمر بالتسليم إليه

If a person claims that he is the proxy for someone in absentia, to collect his debt and the debtor accepts this claim, the debtor shall be instructed to hand over the debt[597] to this person. If the absent person later confirms this it shall be in order. If not, the debtor shall have to pay the debt again to the creditor and institute a claim against the proxy if he still has it in his possession.[598] If a person claims that he is the proxy for the collection of an item deposited for safekeeping (*wadīʿa)* (on behalf of a person in absentia)

[597] Since both parties (debtor and proxy) agree that the proxy has the right to collect the amount and the debt will be paid with the general funds belonging to the debtor himself (and not the precise funds of the creditor, as debts are paid with general funds equivalent to the amount borrowed and not with the precise funds borrowed) it will have to be given to him.

[598] i.e. the funds handed to him are still with him and have not been lost or destroyed due to his negligence.

and the one in whose possession the item is accepts, this he shall not be instructed to hand it over to him.[599]

[599] The difference here is that the item that will be handed over belongs to the absent owner. Even though the two present parties agree that the proxy has the right to collect the item, judgement cannot be passed against a person in absentia.

كتاب الكفالة
Chapter: Suretyship

الكفالة ضربان كفالة بالنفس وكفالة بالمال

Suretyship[600] is of two types: (1) Suretyship of person and (2) Suretyship of property.

فالكفالة بالنفس جائزة والمضمون بها إحضار المكفول به
وتنعقد إذا قال تكفلت بنفس فلان أ وبرقبته أو بروحه أو بجسده أو برأسه
أو بنصفه أو بثلثه وكذلك إن قال ضمنته أو هو علي أو إلي أو أنا زعيم به أو قبيل

Suretyship of person shall be valid[601] and the thing that shall become due shall be ensuring the appearance of the person for whom surety is stood. Such suretyship shall be contracted with the words 'I have stood surety for so and so's person, neck, spirit, body, head[602], half or third.[603]' Similarly, if he

[600] *Kafāla* refers to adding a third party obligation to an existing obligation with respect to an action, project or sum of money. This contract makes the third party (*kafīl*) liable, jointly with the original debtor. The contract is a gratuitous one and the surety cannot charge a fee for the guarantee per se. He could, however, charge some administration fees which are not linked to the duration or the amount of the contract.

[601] The Ḥanafīs accept the validity of suretyship for an individual since the surety is in a position, by adopting the necessary measures, to fulfil his liability of ensuring the appearance of the individual whom stood surety is stood for.

[602] These words in the normal course of the language are used to denote the person in his entirety.

[603] These words are also used to denote the person in his entirety as an individual cannot be split into halves or thirds.

says 'I am liable for him', He is on me' or 'towards me', 'I am responsible for him' or 'I accept him (as my responsibility.)[604]

فإن شرط في الكفالة تسليم المكفول به في وقت بعينه لزمه إحضاره
إذا طالبه به في ذلك الوقت فإن أحضره وإلا حبسه الحاكم حتى يحضره

If it is stipulated, in the contract of suretyship, that the person for whom surety is stood must be made to appear at a specific time, it shall be binding on the surety to ensure his appearance at that time, if the claimant requests him to do so. If he fails in ensuring his appearance the judge may detain him until he complies.

وإذا أحضره وسلمه في مكان يقدر المكفول له على محاكمته برئ الكفيل من الكفالة

If he makes him appear and hands him over in a place where the person in whose favour the surety was given is able to institute legal proceedings against him then the surety shall be absolved of his suretyship.

وإذا تكفل به على أن يسلمه في مجلس القاضي فسلمه في السوق برئ
وإن سلمه في برية لم يبرأ

If he stands surety with the stipulation that he will hand him over in the court of the Qāḍī and he subsequently hands him over in the marketplace[605] he shall be absolved of the suretyship. If he hands him over outside the city,[606] he shall not be absolved of his suretyship.

[604] Although explicit words for suretyship are not used, it can also be contracted using words denoting its legal effect such as liability or responsibility.
[605] This is because the claimant is able to institute legal proceedings against him as courts were easily accessible in all cities in those days.
[606] i.e. in a place where there is no court or Qāḍī.

وإن مات المكفول به برئ الكفيل بالنفس من الكفالة

If the person for whom surety was stood passes away the surety of person shall be absolved of the suretyship.[607]

فإن تكفل بنفسه على أنه إن لم يواف به في وقت كذا فهو ضامن لما عليه وهو ألف ولم يحضره في ذلك الوقت لزمه ضمان المال ولم يبرأ من الكفالة بالنفس

If a person stands surety for a person with the stipulation that if he does not make him appear at a certain (specified) time he shall be liable for the debt upon him, which is one thousand, and he thereafter does not make him appear at that time he shall be liable for the debt[608] and shall not be absolved of the suretyship of person.

ولا يجوز الكفالة بالنفس في الحدود والقصاص عند أبي حنيفة وقالا يجوز

Suretyship of person in cases of *ḥudūd* and *qiṣāṣ* shall not be valid[609] according to Imām Abū Ḥanīfa. The other two Imāms are of the view that it shall be valid.

وأما الكفالة بالمال فجائزة معلوما كان المال المكفول به أو مجهولا إذا كان دينا صحيحا مثل أن يقول تكلفت عنه بألف أو بما لك عليه أو بما يدركك في هذا البيع

Suretyship of property shall be valid whether the amount stood surety for is known or unknown as long as it is a valid debt.[610] (It becomes contracted) by

[607] Since the person has passed away he is no longer able to present himself and hence the surety is no longer liable to present him.

[608] In this instance he suspended the suretyship of property on a contingent event i.e. not presenting the person at a certain time. The suretyship of property therefore takes effect when the contingent event occurs.

[609] According to the commentators such suretyship may not be legally demanded according to Imām Abū Ḥanīfa from the defendant in cases of *ḥudūd* and *qiṣāṣ* but if given voluntarily it shall be valid. This is in line with the Sharīʿa treatment of *ḥudūd* and *qiṣāṣ* in terms of their falling away in cases of the slightest doubt.

[610] A valid debt is one which is extinguished by fulfilling it or by the creditor's

a person saying for example ‘I have stood surety for him for one thousand’ or ‘for what he owes you’ or ‘for what reaches[611] you in this sale.’

والمكفول به بالخيار إن شاء طالب الذي عليه الأصل وإن شاء طالب كفيله

The person in whose favour a surety is given shall have the option of pursuing the original debtor or the surety.

ويجوز تعليق الكفالة بالشرط مثل أن يقول ما بايعت فلانا فعلي
أو ما ذاب لك عليه فعلي أو ما غصبك فعلي

The suspension of suretyship with a condition[612] shall be valid e.g. A person says, ‘Whatever transaction you do with so and so is on me’ or ‘Whatever debt he owes you is on me’ or ‘Whatever he usurps from you is on me.’

وإذا قال تكفلت بما لك عليه فقامت البينة بألف عليه ضمنه الكفيل
فإن لم تقم البينة فالقول قول الكفيل مع يمينه في مقدار ما يعترف به
فإن اعترف المكفول عنه بأكثر من ذلك لم يصدق على كفيله

If a person says, ‘I stand surety for whatever he owes you’ and thereafter evidence that he owes one thousand is brought, the surety shall be liable for

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waiving it. This is unlike, for instance, the debt of manumission (*kitāba*) owed by a slave which can also be extinguished by the slave’s declaration of his inability to repay the amount.

[611] *Ḍamān al-darak* denotes a misrepresentation guarantee. It is a third-party's guarantee which secures refunding the price to the purchaser if the sold commodity appears to be legally owned by a person other than the seller. In other words, the seller of a property is sometimes asked to provide a surety against any defect in the title of that property, by virtue of which, the purchaser has the right to rescind the contract and redeem his money. *Ḍamān al-darak* is also known as *ḍamān al-ʿuhda.*

[612] This applies as long as the condition is an appropriate one that entails the cause for the establishment of a right (as in the examples given in the text,) or the means to its fulfilment (e.g. ‘If Zaid comes’) or non-fulfilment (e.g. ‘If Zaid leaves.’) Inappropriate conditions (e.g. ‘If the wind blows’ or ‘If it rains’) are not given any consideration.

one thousand. If there is no evidence the statement of the surety with his oath shall be accepted for whatever amount he acknowledges. If the person for whom he stood surety acknowledges more than that, his statement shall not be taken against his surety.

وتجوز الكفالة بأمر المكفول عنه وبغير أمره فإن كفل بأمره رجع بما يؤدي عليه
وإن كفل بغير أمره لم يرجع بما يؤديه

Suretyship shall be valid on the instruction of the person for whom surety is stood and (also) without his instruction. If a person stands surety on the instruction of the person for whom surety is stood he shall claim from him any amount he discharges. If he stands surety without his instruction then he may not claim[613] what he discharges.

وليس للكفيل أن يطالب المكفول عنه بالمال قبل أن يؤدي عنه فإن لوزم بالمال
كان له أن يلازم المكفول عنه حتى يخلصه

The surety may not claim the amount from the person for whom surety is stood prior to discharging the same on his behalf. If he is pursued[614] on account of the amount he shall have the right to pursue the person for whom surety is stood so that he releases him.[615]

[613] In this instance he is deemed to be acting gratuitously and the original debtor is not held liable.

[614] *Mulāzama* refers to the harassment of a recalcitrant debtor through the constant pursuit of him.

[615] Since he was harassed on account of the original debtor, the surety will have the right to mete out the same treatment to him.

وإذا أبرأ الطالب المكفول عنه أو استوفى منه برئ الكفيل
وإن أبرأ الكفيل لم يبرأ المكفول عنه

If the claimant absolves the person for whom surety is stood or receives payment from him, the surety shall be absolved.[616] If he absolves the surety, the person for whom surety is stood shall not be absolved.[617]

ولا يجوز تعليق البراءة من الكفالة بشرط

Absolution from suretyship may not be suspended with a condition.

وكل حق لا يمكن استيفاؤه من الكفيل لا تصح الكفالة به كالحدود والقصاص

Surety shall not be valid in any right that cannot be collected from the surety e.g. legal punishments and retaliation.

وإذا تكفل عن المشتري بالثمن جاز وإن تكفل عن البائع بالمبيع لم يصح

If a person stands surety for the purchase price on behalf of the purchaser it shall be valid.[618] If he stands surety for the sold item on behalf of the seller it shall not be valid.[619]

[616] Once the original debtor is absolved there is no longer any debt and the surety also becomes absolved.
[617] This is because the debt still remains as an obligation on him.
[618] Once the sale is concluded the purchase price becomes a debt like any other and suretyship for it is valid.
[619] It is not possible to stand surety on behalf of seller for the item of sale as the seller's liability with respect to the item of sale is the loss of entitlement to the purchase price. In other words in the event of destruction of the item of sale no payment of compensation is due but the seller loses his entitlement to the purchase price.

ومن استأجر دابة للحمل فإن كانت بعينها لم تصح الكفالة بالحمل
وإن كانت بغير عينها جازت الكفالة

If a person hires an animal to carry (a load) and it was specific, suretyship for the carriage shall not be valid.[620] If it was not specific then the suretyship shall be valid.

ولا تصح الكفالة إلا بقبول المكفول له في مجلس العقد إلا في مسألة واحدة
وهي أن يقول المريض لوارثه تكفل عني بما علي من الدين فتكفل به مع غيبة الغرماء

Suretyship shall only be valid if the person in whose favour the surety is given accepts it in the contractual session with the exception of one situation, which is when a person in (his final) illness says to his heir, 'Be my surety for the debts I am liable for,' and he stands surety for the same in the absence of the creditors.[621]

وإذا كان الدين على اثنين وكل واحد منهما كفيل ضامن عن الآخر فما أدى أحدهما
لم يرجع به على شريكه حتى يزيد ما يؤديه على النصف فيرجع بالزيادة

If two people are liable for a (single) debt and each one of them is surety for the other then whatever each of them discharges he may not claim the same from his partner until what he discharges exceeds half[622] - in which case he may claim the excess.

[620] In some cases (e.g. death of the animal) it will not be within the surety's capacity to fulfil the obligation of carrying the load on that specific animal.
[621] In reality this is a *waṣiyya* (bequest) and is therefore valid even if he does not mention who the creditors are.
[622] Discharge of his own portion of the debt as an original debtor is deemed to take place by his action before his discharge on behalf of the other person as surety.

وإذا تكفل اثنان عن رجل بألف على أن كل واحد منهما كفيل عن صاحبه
فما أداه أحدهما يرجع بنصفه على شريكه قليلا كان أو كثيرا

If two people stand surety for one person for (a debt of) one thousand on condition that each one of them is (also) the surety for his co-surety then whatever each of them discharges he may claim half of the same from his partner irrespective of how little or much it is.[623]

ولا تجوز الكفالة بمال الكتابة حر تكفل به أو عبد

Suretyship for the *kitāba* amount[624] shall not be valid, whether a freeman or slave stands surety.

وإذا مات الرجل وعليه ديون ولم يترك شيئا فتكفل رجل عنه للغرماء
لم تصح الكفالة عند أبي حنيفة وقالا تصح

If a person passes away whilst indebted and does not leave behind anything and a person stands surety in favour of the creditors the suretyship shall not be valid according to Imām Abū Ḥanīfa.[625] According to Imām Abū Yusuf and Imām Muḥammad it shall be valid.[626]

[623] In this case he acts only in his capacity as surety and is equal to his co-surety in all respects.
[624] As discussed previously the amount due in a *kitāba* contract is not deemed to be a valid debt.
[625] Since the person passed away without leaving behind anything the debt falls away permanently and it is no longer possible for anyone to stand surety for it.
[626] The two Imāms regard the debt to be outstanding even after his death and the suretyship is therefore valid.

كتاب الحوالة
Chapter: *Ḥawāla* (Debt Transfer)

الحوالة جائزة بالديون وتصح برضا المحيل والمحتال له والمحال عليه

Ḥawāla[627] shall be valid for debts with the consent of the transferor, the transferee and the one on whom it is transferred.

وإذا تمت الحوالة برىء المحيل من الدين ولم يرجع المحتال على المحيل
إلاأن يتوى حقه والتوى عند أبي حنيفة أحد أمرين إما أن يجحد الحوالة ويحلف
ولا بينة عليه أو يموت مفلسا وقال أبو يوسف و محمد هاذان ووجه ثالث
وهو أن يحكم الحاكم بإفلاسه في حال حياته

Once the transfer takes place the transferor shall become absolved of the debt[628] and the transferee may not claim it from the transferor unless his right is lost. According to Imam Abū Ḥanīfa this loss may occur in one of two ways: he denies the transfer and swears an oath without there being any evidence against him or he dies insolvent. According to Imām Abū Yūsuf and Imām Muḥammad, in addition to these two there is a third situation which is when the judge declares him to be bankrupt whilst he is still living.[629]

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[627] *Ḥawāla* means the transfer of debt from one debtor (the *muḥīl* or the transferor) to another person (the *muḥāl ʿalayh* or transferee.) After the debt is transferred, the transferor is freed from any debt obligation toward his creditor (known as the *muḥtāl* or the *muḥtāl lahū*) who should now claim his money from the transferee. Just like *kafāla* the contract of *ḥawāla* is meant to be gratuitous and no fee may be charged for it except for administration costs. The transferee may accept the transfer of the debt on account of a debt owed by him to the transferor (called *ḥawāla muqayyada*) or even if he is not indebted to him (called *ḥawāla muṭlaqa*.)

[628] The debt is now transferred to the liability of the one on whom it was transferred (*muḥāl ʿalayh*) and he replaces the original debtor.

[629] This is based on the difference of opinion regarding the declaration of

وإذا طالب المحال عليه المحيل بمثل مال الحواله فقال المحيل أحلت بدين لي عليك
لم يقبل قوله وكان عليه مثل الدين وإن طالب المحيل المحتال بما أحاله به فقال
إنما أحلتك لتقبضه لي وقال المحتال بل أحلتني بدين لي عليك فالقول قول المحيل

If the one on whom it was transferred demands the amount of the transfer from the transferor and the transferor says, 'I transferred it in lieu of a debt that you owe me,' his statement shall not be accepted[630] and he shall be liable for the amount of the debt. If the transferor demands the amount he transferred from the transferee and says, 'I only transferred it to you to collect it for me,' and the transferee says, 'Rather, you transferred it to me in lieu of a debt you owe me[631],' the statement of the transferor shall be accepted.

و يكره السفاتج وهو قرض استفاد به المقرض أمن خطر الطريق

Bills of exchange[632] are disliked. This refers to a loan by which the lender gains the benefit[633] of safety from the risk of the path.[634]

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bankruptcy by a judge (court.)

[630] This is a claim of a new debt for which he must produce evidence, failing which the statement of the one who denies this claim will be accepted. Acceptance of the transfer by the transferee does not serve as evidence of the existence of a debt as this could be a case of *ḥawāla muṭlaqa.*

[631] Again, this is a claim of a new debt for which he must produce evidence, failing which the statement of the one who denies this claim will be accepted.

[632] *Safātij* is the plural of *suftaja* or *saftaja* and refers to an early kind of promissory note or bill of payment or exchange that was used in the manner defined by the author in the text.

[633] It is an accepted principle in *fiqh*, which has been transmitted from certain companions and followers, that 'any loan that draws a benefit is prohibited.'

[634] An example of this is when A lends B 100 gold dinars in Cairo, then B gives A a note or bill of exchange entitling him to collect 100 gold dinars in Baghdad from an account he has with another merchant there. Another example is when A, who is Cairo, wishes to send 100 gold dinars to C in Baghdad. Instead of simply handing it to B, who is travelling, to give to C, he lends the amount to B with the instruction to repay the loan to C in Baghdad. In both examples the risk of the amount's being lost

or stolen on the road is not borne by A. In the first example A is able to travel to Baghdad without carrying the money and in the second example the risk is borne by B, the borrower, who is travelling. (The benefit for B is that he is free to use the amount until payment becomes due in Baghdad.)

كتاب الصلح
Chapter: *Ṣulḥ* (Settlement)

الصلح على ثلاثة أضرب صلح مع إقرار وصلح مع سكوت
وهو أن لا يقر المدعى عليه ولا ينكره وصلح مع إنكار وكل ذلك جائز

Settlement is of three types: Settlement with acknowledgement, settlement with silence, which is when the defendant does not acknowledge nor deny (the claim), and settlement with denial. All these types shall be valid.

فإن وقع الصلح عن إقرار اعتبر فيه ما يعتبر في البياعات إن وقع عن مال بمال
وإن وقع عن مال بمنافع فيعتبر بالإجارات

If a settlement takes place with acknowledgement then the same that is considered in sale transactions shall be considered, if it occurs in respect of wealth in exchange for wealth.[635] If it occurs in respect of wealth in exchange for benefits it shall be considered in accordance with lease transactions.[636]

والصلح عن السكوت والإنكار في حق المدعى عليه لافتداء اليمين وقطع الخصومة
وفي حق المدعي بمعنى المعاوضة

Settlement with silence and denial shall be, with respect to the defendant, in order to redeem him from (taking) the oath and to put an end to the dispute.[637] With respect to the plaintiff, it shall be in the sense of a mutual

[635] The laws applicable to sale transactions shall apply here e.g. laws relating to pre-emption, entitlement, defect etc.
[636] This means that the laws applicable to lease transactions (*ijāra*) shall apply to it e.g. there must be a fixed term.
[637] The defendant in these two cases is deemed to be the owner of the disputed asset and no exchange is deemed to have taken place with respect to him.

exchange.[638]

وإذا صالح عن دار لم تجب فيه شفعة وإذا صالح على دار وجبت فيها الشفعة

If a person settles[639] with respect to a house,[640] pre-emption shall not be binding in it. If he settles on a house[641] pre-emption shall be binding.

وإذا كان الصلح عن إقرار فاستحق بعض المصالح عنه رجع المدعى عليه بحصة ذلك من العوض

If the settlement takes places with acknowledgement and a third party becomes entitled to part of the asset, with respect to which the settlement was reached, the defendant shall claim the same proportion of the (consideration given in) exchange.[642]

[638] The plaintiff's assumption is that he has accepted the settlement consideration in lieu of his entitlement in the disputed asset. Thus it is deemed to be an exchange with respect to him.

[639] This refers to a settlement with silence or denial. If the settlement took place with acknowledgement then pre-emption will be binding as this is deemed to be a mutual exchange.

[640] The house in this instance is the subject of the dispute and the defendant retains it by paying some settlement consideration. Since the transaction is not deemed to be an exchange with respect to him, there is no pre-emption.

[641] In this case the house is given to the plaintiff by the defendant as consideration in lieu of some other disputed asset and since the transaction, with respect to the plaintiff, is deemed to be a mutual exchange, pre-emption shall be binding.

[642] Since this settlement is deemed to be a mutual exchange the same law as that of entitlement in a sale transaction shall apply here.

وإن وقع الصلح عن سكوت أو إنكار فاستحق المتنازع فيه رجع المدعي بالخصومة
ورد العوض وإن استحق بعض ذلك رد حصته ورجع بالخصومة فيه
وإن ادعى حقا في دار لم يبينه فصولح من ذلك على شيء ثم استحق بعض الدار
لم يرد شيئا من العوض لأن دعواه يجوز أن تكون فيما بقي

If settlement takes place with silence or denial and a third party becomes entitled to the disputed asset, the plaintiff shall return to litigation and return the consideration.[643] If a third party becomes entitled to (only) part of the asset, he shall return its portion and return to litigation for the same. If a person claims a right in a house, but does not specify the same,[644] and a settlement is reached with respect to that on something, and thereafter a third party becomes entitled to part of the house, he shall not return any part of the consideration because it is possible that his claim relates to the remaining part.

والصلح جائز من دعوى الأموال والمنافع وجناية العمد والخطإ
ولا يجوز من دعوى حد

Settlement shall be valid for claims of assets, benefits,[645] and deliberate and unintentional offences.[646] It shall not be valid for claims of legal

[643] In other words, he can commence with litigation against that third party. The consideration must be returned to the original defendant as he had only paid the consideration to put an end to the dispute but it has now come to light that there is actually no dispute with him.

[644] In other words, he does not specify whether this right is in a specified portion of the property or in an undivided portion of the property, such as a common share of one half or a third.

[645] An example of a claim of a benefit is if a person claims the right to reside in a property for a year on the basis that the deceased owner had made such a bequest for him in his will. If he reaches a settlement and accepts something in exchange for this it will be valid and treated like a lease transaction.

[646] This applies to deliberate and unintentional offences against life or limb as defined in the chapter on offences (*jināyāt*) which appears in the latter section of the *Mukhtaṣar* and is not covered in this commentary. Settlement is valid in all these

punishments.[647]

وإذا ادعى رجل على امرأة نكاحا وهي تجحد فصالحته على مال بذلته
حتى يترك الدعوى جاز وكان في معنى الخلع
وإن ادعت امرأة نكاحا على رجل فصالحها على مال بذله لها لم يجز

If a man brings a claim of marriage against a woman who denies the same and then she reaches a settlement with him on some property that she gives (to him) for him to abandon the claim, it shall be valid and shall be in the sense of *khulʿ*.[648] If a woman brings a claim of marriage against a man and he then reaches a settlement with her on some property that he gives to her, it shall not be valid.[649]

وإن ادعى على رجل أنه عبده فصالحه على مال أعطاه جاز
وكان في حق المدعي في معنى العتق على مال

If a person makes a claim against another person that he is his slave and then he reaches a settlement with him on some asset that he gives him, it

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instances because the person possesses a valid right to which he is entitled and may opt to accept something in exchange for it. However in the case of unintentional offences the settlement amount may not exceed the prescribed indemnity for bodily injuries.

[647] Legal punishments (*ḥudūd*), which refer to punishments prescribed in the Qurʾān or Ḥadīth, are the right of Allah and the person cannot take anything in exchange for it. This does not refer to *qiṣāṣ* (legal retaliation) which is the right of the successors of the murdered person, who may accept a settlement in lieu of it as mentioned in Qurʾān 2:178, "You who believe, fair retribution is prescribed for you in cases of murder...But if the culprit is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way."

[648] With respect to the man this is deemed a *khulʿ* as he deems it to be a contractual dissolution of the marriage in which the wife pays him some compensation. With respect to the woman, who had denied the claim, the settlement is deemed to be a means of putting an end to the dispute.

[649] Since there is no established paradigm to validate a woman's acceptance of payment from a man in a separation this settlement is not valid.

shall be valid and it shall be, with respect to the plaintiff, in the sense of emancipation in exchange for an asset.[650]

وكل شيء وقع عليه الصلح وهو مستحق بعقد المداينة لم يحمل على المعاوضة
وإنما يحمل على أنه استوفى بعض حقه وأسقط باقيه كمن له على رجل ألف دراهم جياد
فصالحه على خمسمائة زيوف جاز وصار كأنه أبرأه عن بعض حقه وأخذ باقيه
ولو صالحه على ألف مؤجل جاز وصار كأنه أجل نفس الحق ولو صالحه على دنانير
إلى شهر لم يجز ولو كان له ألف مؤجلة فصالحه على خمسمائة حالة لم يجز
ولو كان له ألف سود فصالحه على خمسمائة بيض لم يجز

If settlement takes place on anything that is (also) due by (virtue of) the debt contract, this shall not be regarded as a mutual exchange[651] but shall be regarded as his having collected part of his right and waived the remaining part. e.g. If a person is entitled to (receive) one thousand *jiyād* dirhams from another person and reaches a settlement with him on five hundred *zuyūf*, it shall be valid and it will be as if he has waived off part of his right from him and taken part. If he reaches a settlement with him on one thousand deferred it shall be valid and it will be as if he deferred the actual right.[652] If

[650] With respect to the defendant it shall also be deemed as emancipation in exchange for an asset if the settlement was reached on the basis of acknowledgement. In such a case clientage (*walāʾ*) will be established for the emancipator. If the settlement was reached without the acknowledgement of the defendant, it will be deemed to be simply a means to putting an end to the dispute with respect to him and there will be no clientage.

[651] It cannot be deemed a mutual exchange as this will result in a usury (*ribā*) transaction, due to the fact that the two items of exchange are of the same genus but differ in quantity, and will render the settlement invalid. In order to validate the settlement it shall be deemed as a waiver of part of his right as mentioned in the text.

[652] In this case also it is not possible to deem it a mutual exchange as there is a deferment on one side of the transaction relating to items of usury (*ribā*) and will result in *ribā al-nasaʾ*. It is therefore deemed to be a straightforward deferment of the debt.

he reaches a settlement with him on dīnārs to be paid after one month it shall not be valid.[653] If he was owed one thousand deferred and reaches a settlement with him on five hundred cash it shall not be valid.[654] If he was owed one thousand black[655] (dirhams) and reaches a settlement with him on five hundred white (dirhams)[656] it shall not be valid.

ومن وكل رجلا بالصلح عنه فصالحه لم يلزم الوكيل ما صالح عليه
إلا أن يضمنه والمال لازم للموكل

If a person appoints someone as proxy to reach a settlement on his behalf and he does so the proxy shall not be liable for the thing he settles on unless he assumes liability thereof. (Instead) the principal shall be liable for the amount.[657]

[653] In this case it is not possible to deem it a deferment of the debt itself as the settlement is effected on something different to what was due by the debt contract. Thus it may only be deemed a mutual exchange and the settlement will be rendered invalid because dirhams cannot be exchanged for dīnārs on credit as discussed in the chapter on *ṣarf.*

[654] Since, the contract did not entitle him to a cash payment, which is better than deferred payment, this additional benefit is deemed to be in exchange for the amount of the discount. An exchange of money for time is not permitted in Sharīʿa. Thus a bilateral agreement for an 'early settlement discount' in respect of a deferred debt is not permitted. If the creditor unilaterally grants a discount to the debtor, without this being a condition for the early payment, this is allowed.

[655] Black dirhams refer to dirhams minted from black silver.

[656] In this case too, since the contract did not entitle him to white dirhams, which are superior to black dirhams, this is deemed to be an exchange and cannot be valid due to the quantities being unequal.

[657] This applies to a settlement for a murder or settlement on part of a debt, where the proxy is a mere facilitator. If the settlement was effected on one asset for another, this is deemed a mutual exchange, and the proxy shall be liable for the rights and obligations related to the contract as mentioned in the chapter of *wakāla.*

فإن صالح عنه على شيء بغير أمره فهو على أربعة أوجه إن صالح بمال وضمنه تم الصلح
وكذلك لو قال صالحتك على ألفي هذه تم الصلح ولزمه تسليمها
وكذلك لو قال صالحتك على ألف وسلمها وإن قال صالحتك على ألف ولم يسلمها
فالعقد موقوف فإن أجازه المدعى عليه جاز ولزمه الألف وإن لم يجزه بطل

If a person reaches a settlement on someone's behalf on something without his instruction it can be of four types: If he settles on some asset and assumes liability thereof the settlement shall take place.[658] The same applies if he says, 'I have settled with you on this one thousand of mine.'[659] The settlement shall take place and it shall be binding on him to hand it over. Likewise, if he says, 'I have settled with you on one thousand,' and he hands it over.[660] If he says, 'I have settled with you on one thousand,' and he does not hand it over, the contract shall be pending:[661] If the defendant approves it, it shall become valid and he shall be liable for the one thousand. If he does not approve it, it shall become void.

وإذا كان الدين بين شريكين فصالح أحدهما من نصيبه على ثوب فشريكه بالخيارإن شاء
اتبع الذي عليه الدين بنصفه وإن شاء أخذ نصف الثوب إلا أن يضمن له شريكه ربع
الدين ولو استوفى نصف نصيبه من الدين كان لشريكه أن يشركه فيما قبض ثم يرجعان
على الغريم بالباقي ولو اشترى أحدهما بنصيبه من الدين سلعة
كان لشريكه أن يضمنه ربع الدين

If a debt is (owned) by two partners and one of them reaches a settlement

[658] In this case the person is deemed to be acting in a gratuitous capacity and may not reclaim this amount from the original debtor.

[659] By attributing the transaction to his own funds, he has undertaken to pay the amount personally.

[660] Since he actually handed it over the settlement becomes valid, even though he didn't attribute it to his own funds as in the previous case.

[661] Since he did not attribute it to his own funds there is no undertaking from him to pay the amount. Thus the amount will be due from the principal debtor (i.e. the defendant) but only if he approves the settlement.

for his portion on a garment, his partner shall have an option: If he wishes he may pursue the debtor for his half or if he wishes he may take half the garment[662] – unless his partner[663] assumes liability of a quarter of the debt in his favour. If he collects half of his portion of the debt his partner shall share with him what he collected and thereafter both of them shall claim the balance (of the debt) from the debtor. If one of them purchases some item in exchange for his portion of the debt, his partner may hold him liable for a quarter of the debt.[664]

وإذا كان السلم بين شريكين فصالح أحدهما من نصيبه على رأس المال
لم يجز عند أبي حنيفة و محمد وقال أبو يوسف يجوز الصلح

If a *salam* contract is (shared) between two partners and one of them reaches a settlement for his portion on the capital amount it shall not be valid according to Imām Abū Ḥanīfa and Imām Muḥammad.[665] According to Imām Abū Yūsuf, the settlement shall be valid.[666]

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[662] The principle that applies here is that a commonly shared debt cannot be distributed prior to its being collected. Thus when the partner effected a settlement for half the debt this was for both partners and not for his portion only.

[663] The option to do this is given to the partner in this case, unlike the case below, because in a settlement transaction a person is usually accommodating and does not insist on his full rights.

[664] In this case he is liable for a quarter of the debt, without any option, because it is assumed that he had received the full value of his share by concluding the sale transaction, since a person usually haggles in a purchase and sale transaction and tries to obtain the best deal.

[665] By reaching such a settlement he is actually cancelling the *salam* contract for his portion of the *muslam fīh*, which is a debt. As discussed above, a commonly shared debt cannot be distributed prior to its being collected. The settlement also cannot be valid for the full *muslam fīh* as he cannot cancel the contract without the consent of his partner.

[666] Imām Abū Yūsuf applies the ruling for other debts, as discussed above, in this case as well.

وإذا كانت التركة بين ورثة فأخرجوا أحدهم منها بمال أعطوه إياه والتركة عقار أو عروض
جاز قليلا كان ما أعطوه أو كثيرا وإن كانت التركة فضة فأعطوه ذهبا أو كانت ذهبا
فأعطوه فضة فهو كذلك وإن كانت التركة ذهبا وفضة وغير ذلك فصالحوه على فضة
أو ذهب فلا بد أن يكون ما أعطوه أكثر من نصيبه من ذلك الجنس
حتى يكون نصيبه بمثله والزيادة بحقه من بقية الميراث

If an estate is (shared) between a number of heirs and they exclude one of them from it in exchange for (some) wealth they give him, while the estate consists of immovable property or goods, it shall be valid no matter how little or much they give him.[667] If the estate consists of silver and they give him gold, or if it was gold and they give him silver, then the same shall apply.[668] If the estate consists of gold, silver and other assets and they reach a settlement with him on silver or gold then it shall be necessary that what they give him must be more than his share of that genus so that his share could be in exchange for the equivalent (amount) and the excess (shall be in exchange) for his right in the balance of the estate.[669]

وإن كان في التركة دين على الناس فأدخلوه في الصلح على أن يخرجوا المصالح عنه
ويكون الدين لهم فالصلح باطل فإن شرطوا أن يبرئ الغرماء منه ولا يرجع عليهم
بنصيب المصالح فالصلح جائز

If there is a debt owed to the estate by people and they (i.e. the heirs) include it in the settlement with the stipulation that they will exclude the heir with whom they are reaching a settlement from such debt and that the

[667] This is known as *takhāruj* and is deemed a sale by that heir of his share in the estate in exchange for the amount received.

[668] This is deemed an exchange of gold for silver and therefore equivalence in quantity is not required. However, since this is a *ṣarf* (currency exchange) transaction, possession of both exchanges must be taken in the contractual session.

[669] This is required in order to avoid usury (*ribā*) as discussed previously. The gold and silver have to be in exchanged for an equal quantity of the same genus without there being any excess free of a reciprocal exchange or else it would result in *ribā*.

debt shall be theirs, the settlement shall be void.[670] If they stipulate that he should absolve the debtors from it and that the share of the one with whom they are reaching a settlement will not be claimed from them then the settlement shall be valid.[671]

[670] The Sharīʿa does not allow the transfer of ownership of a debt except to the debtor himself and this will cause the entire settlement to become void.

[671] This is a method to make the settlement valid as in this case the exiting heir's share of the debt is waived and excluded from the settlement altogether. Another method, which does not prejudice the other heirs, is for them to lend the exiting heir an amount equivalent to his share of the debt and thereafter to reach a settlement for the balance of the estate excluding the debt. The exiting heir may then refer them, by means of *ḥawāla*, to collect the outstanding loan from the debtors.

كتاب الهبة
Chapter: *Hiba* (Gift)

الهبة تصح بالإيجاب والقبول وتتم بالقبض فإذا قبض الموهوب له في المجلس بغير أمر الواهب جاز وإن قبض بعد الافتراق لم تصح إلا أن يأذن له الواهب في القبض

A gift shall be valid by offer and acceptance[672] and shall be complete by possession.[673] If the person to whom the gift was given takes possession in the contractual session without the instruction of the gifter it shall be valid.[674] If he takes possession after separation it shall not be valid unless the gifter permits him to take possession.[675]

وتنعقد الهبة بقوله وهبت ونحلت وأعطيت وأطعمتك هذا الطعام وجعلت هذا الثوب لك وأعمرتك هذا الشيء وحملتك على هذه الدابة إذا نوى بالحملان الهبة

A gift shall be contracted by the words, 'I have gifted,' 'I have bestowed,' 'I have given,' 'I have fed[676] you this food,' 'I have made this garment yours,' 'I have given this thing to you for life[677],' and 'I have carried you upon this

[672] Like any other contract, an offer and acceptance is required for its validity.

[673] Possession of the subject matter of the gift must be as complete as possible in accordance to its nature e.g. possession of immoveable property will be by taking possession of the keys and by the previous owner's vacating the property.

[674] Although the gifter did not explicitly permit the receiver to take possession, it is deemed that this was implicit in the offer.

[675] Taking possession, being a condition for the conclusion of the gift contract, is similar to acceptance in a contract of sale and cannot take place once the contractual session has ended, unless with the explicit permission of the gifter, in which case it can be deemed to be a new contract.

[676] When feeding is attributed to something edible it refers to a gift. However when it is attributed to something inedible (e.g. a piece of land) it refers to lending (*ʿāriyya.*)

[677] This is referred to as *ʿumrā* and will be discussed a little later in this chapter. Even

animal,' if he intends a gift by (the word) 'carried.'[678]

ولا تجوز الهبة فيما يقسم إلا محوزة مقسومة وهبة المشاع فيما لا يقسم جائزة

A gift shall not be valid in something divisible[679] unless it is gathered[680] and divided. The gift of common property that is indivisible[681] shall be valid.

ومن وهب شقصا مشاعا فالهبة فاسدة فإن قسمه وسلمه جاز

If a person gifts common property, the gift shall be invalid. If he divides it and hands it over it shall be valid.[682]

ولو وهب دقيقا في حنطة أو دهنا في سمسم فالهبة فاسدة فإن طحن وسلم لم يجز

If a person gifts flour within wheat or oil within sesame seeds, the gift shall be invalid. If he grinds (it) and hands (it) over it shall not become valid.[683]

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though the giver restricted the gift to the lifespan of the recipient the Ḥanafīs deem this to be a gift without limitation based on the ḥadīth.

[678] The word 'carry' (*ḥaml*) does not explicitly mean a gift but could possibly have this meaning and is interpreted as such if the person intends the same. Without such an intention, the literal meaning, which is to 'let someone ride an animal' in the sense of *ʿāriyya*, is taken.

[679] This refers to any item or property that can be divided and which remains useful for the same purpose it was used for prior to being divided.

[680] The item must not be scattered or occupied by the property of the giver. Thus fruit on a tree and crops on land may not be given as a gift prior to being plucked or harvested.

[681] This applies when the item is actually indivisible, such as a slave or animal, and also when the item is physically divisible but can no longer be used for the same purpose after being divided such as a small bathroom or mill.

[682] The contract becomes valid as there exists no issue of common possession at the time of the completion of the gift contract i.e. when the subject matter is handed over.

[683] The difference between this case and the previous case is that here the subject matter of the gift contract (i.e. the flour or oil) is non-existent whereas in the previous case the undivided portion of the property is existent at the time of the

وإذا كانت العين في يد الموهوب له ملكها بالهبة وإن لم يجدد فيها قبضا

If the item is in the possession of the one to whom it was gifted, he shall become the owner of it by the gift (contract) even though he does not renew possession therein.[684]

وإذا وهب الأب لابنه الصغير هبة ملكها الابن بالعقد
فإن وهب له أجنبي هبة تمت بقبض الأب

If a father gives his minor son a gift, the son shall become the owner thereof by the (mere) contract.[685] If a stranger gives him a gift it shall be complete by the father's taking possession (thereof).

وإذا وهب لليتيم هبة فقبضها له وليه جاز فإن كان في حجر أمه فقبضها له جائز
وكذلك إن كان في حجر أجنبي يربيه فقبضه له جائز وإن قبض الصبي الهبة بنفسه جاز

If an orphan is given a gift and his guardian[686] takes possession on his behalf it shall be valid. If he is in the care of his mother, then her (taking) possession on his behalf shall be valid. The same applies if he is in the care of a stranger that is raising him - his (taking) possession on his behalf shall be valid. If the child takes possession of the gift himself, it shall be valid.[687]

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gift.

[684] If the item is already in his possession in a fiduciary capacity (e.g. it was kept with him for safekeeping as a *wadīʿa* as opposed to an item kept as a *rahn*) this can take the place of the possession required for the completion of the gift. This does not apply in the case of a sale, in which case he will have to re-take possession as the nature of possession in a sale is not of a fiduciary nature (*qabḍ al-ḍamān*.)

[685] Since the item is already in the possession of the father and the father has authority to take possession on behalf of his minor son there is no need for a renewal of possession.

[686] 'Guardian' here refers to the father or his executor and thereafter the grandfather or his executor.

[687] Since receiving a gift and taking possession thereof is of pure benefit for the child and does not require deliberation, the child, if discerning, or anyone in whose care he is in the absence of the father, may take possession of it.

وإن وهب اثنان من واحد دارا جاز وإن وهب واحد من اثنين دارا لم يصح
عند أبي حنيفة وقال أبو يوسف و محمد يصح

If two people gift a house to one person it shall be valid.[688] If one person gifts a house to two people, it shall not be valid according to Imām Abū Ḥanīfa.[689] According to Imām Abū Yūsuf and Imām Muḥammad it shall be valid.[690]

وإذا وهب هبة لأجنبي فله الرجوع فيها إلا أن يعوضه عنها أو تزيد زيادة متصلة
أو يموت أحد المتعاقدين أو تخرج الهبة من ملك الموهوب له

If a person gives a gift to a stranger, he shall have the right to retract the same[691] unless he gives him something in exchange for it[692], or it increases with an attached increase[693], or one of the two contracting parties dies[694], or the gift leaves the ownership of the one to whom it was given.[695]

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[688] Although each of them owned a common share in the property, the gift is valid because both of them gifted their share at the same time and the recipient received the entire property jointly.

[689] Imām Abū Ḥanīfa deems this to be a gift of half the house to each person individually and is therefore not valid due to the issue of common ownership as discussed previously.

[690] They deem the gift to be concluded and delivered at once jointly and it is therefore valid.

[691] Although it is legally valid to retract a gift, it is nevertheless disliked (*makrūh*) and has been disapproved of in the ḥadīth. In some cases, as mentioned by the author, the giver loses the legal right to retract the gift.

[692] Since the purpose of the gift, which is to receive something in return has been fulfilled, the gift cannot be taken back.

[693] In this case it is not possible to retract the gift without the attached increase. Retracting it with the increase is also not permitted as the increase did not form part of the original contract.

[694] Once the person who received the gift dies, ownership of that item passes on to his heirs, who are unrelated to the contract.

[695] Since the item left the ownership of the person to whom it was gifted with the tacit authorisation of the giver by his having gifted it to him, the giver is not permitted to disrupt that transaction.

وإن وهب هبة لذي رحم محرم منه فلا رجوع فيها وكذلك ما وهب أحد الزوجين للآخر

If a person gives a gift to a close forbidden[696] relative of his, he shall not[697] have the right to retract it. The same law shall apply to a gift that one spouse gives to the other.

وإذا قال الموهوب له للواهب خذ هذا عوضا عن هبتك أو بدلا عنها أو في مقابلتها فقبضه الواهب سقط الرجوع وإن عوضه أجنبي عن الموهوب له متبرعا فقبض الواهب العوض سقط الرجوع

If the person to whom the gift was given says to the one who gave it, 'Take this in exchange for your gift or as a replacement for it or in lieu of it,' and the gifter takes possession of it the right to retract it shall fall away.[698] If an (unrelated) third person gratuitously gives him an exchange on behalf of the person to whom the gift was given and the gifter takes possession of such exchange the right to retract (the gift) shall fall away.

وإذا استحق نصف الهبة رجع بنصف العوض وإن استحق نصف العوض لم يرجع في الهبة إلا أن يرد ما بقي من العوض ثم يرجع

If a third party becomes entitled to half of the gift, he may retract half of the exchange.[699] If a third party becomes entitled to half of the exchange, he may not retract (anything) of the gift[700] unless he returns the remainder of

[696] This refers to a relative with whom marriage is forbidden (*maḥram*) e.g. a sister.

[697] In this instance the purpose of the gift is joining family ties and this has been achieved.

[698] In order for the transaction to be deemed an exchange for the original gift, it must be expressly stated to be such and the giver must be aware that it is an exchange for his gift and he must take possession of it. If not, it will be an independent gift transaction and both givers shall retain the right to retract the gift in each of those transactions.

[699] This is because he is left with an exchange which is for only half the gift.

[700] Since the half of the exchange that remains could have been an exchange for the full gift initially, it is deemed to be such after the entitlement. However the

the exchange, where after he may retract (the full gift).

ولا يصح الرجوع إلا بتراضيهما أو بحكم الحاكم

Retraction shall only be valid with the consent of both parties or by the judgement of a judge.

وإذا تلفت العين الموهوبة فاستحقها مستحق فضمن الموهوب له
لم يرجع على الواهب بشيء

If the article given as a gift is destroyed and thereafter some person becomes entitled to it and holds the person to whom the gift was given liable, he may not claim anything from the giver.[701]

وإذا وهب بشرط العوض اعتبر التقابض في العوضين وإذا تقابضا صح العقد
وصار في حكم البيع يرد بالعيب وخيار الرؤية وتجب فيه الشفعة

If a person gives a gift with the stipulation of an exchange[702], possession of both exchanges shall be taken into consideration.[703] Once they both take possession, the contract shall be valid and shall have the effect of a sale[704], in that the item may be returned in the case of a defect or (on the basis of) the on sight option and pre-emption shall be binding in it.

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recipient is granted an option, as mentioned, because the only reason he relinquished his right to retract was that he was under the impression that he will receive the full exchange.

[701] Since a gift transaction is gratuitous, soundness of the item is not a right of the recipient.

[702] He says, for example, "I have gifted this item to you on condition that you give me that (specific) item as an exchange."

[703] The contract is deemed to be a gift originally, as per their designation, and therefore possession is a requirement.

[704] This is because the transaction eventually becomes an exchange of an item of value for another item of value which effectively a sale in Sharīʿa.

والعمرى جائزة للمعمر في حال حياته ولورثته من بعده

ʿUmrā [705]shall be valid (and the item so given shall belong) to the person to whom it is granted whilst he is alive and his heirs after him.

والرقبى باطلة عند أبي حنيفة ومحمد وقال أبو يوسف جائزة

Ruqbā [706] shall be void according to Imām Abū Ḥanīfa and Imām Muḥammad. According to Imām Abū Yūsuf it shall be valid.[707]

ومن وهب جارية إلا حملها صحت الهبة وبطل الاستثناء

If a person gives a slave-girl as a gift excluding her foetus the gift shall be valid and the exclusion shall be void.[708]

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[705] This was a transaction, common in the pre-Islamic period, in which one person would gift his property to another 'for life.' This meant that the item will become the recipient's for as long as he lives and thereafter, on his demise, return to the giver. Even though the gifter restricted the gift to the lifespan of the recipient, the Ḥanafīs deem this to be a valid gift without any limitation, based on the ḥadīth. The stipulation of return to the gifter is therefore void and the item passes on to the heirs of the recipient.

[706] This is similar to the *ʿumrā* transaction except that in a *ruqbā* transaction the intention of the giver is that the item will return to him if the recipient dies first but if he dies first the item will belong exclusively to the recipient.

[707] The two Imāms deem the entire transaction to be void, as it entails suspension of ownership on a contingency, and the gift is therefore invalid. Imām Abū Yūsuf, however, deems the gift to be valid, just as in the case of *ʿumrā*, and regards the stipulation of return to be void.

[708] As discussed in the chapter on the *fāsid* sale, exclusion can only apply to something to which the contract can apply on its own. Including such an exclusion clause in the contract is akin to the inclusion of an invalidating stipulation. However, since gifts, unlike sales, are not invalidated by such stipulations, the gift contract itself remains valid and the stipulation falls away.

والصدقة كالهبة لا تصح إلا بالقبض ولا تجوز في مشاع يحتمل القسمة
وإذا تصدق على فقيرين بشيء جاز ولا يجوز الرجوع في الصدقة بعد القبض

Charity is the same as a gift[709] and shall only be complete by possession. It shall not be valid in common property that is divisible. If a person gives something in charity to two poor persons it shall be valid.[710] Retracting charity after possession (has been taken) shall not be valid.[711]

ومن نذر أن يتصدق بماله لزمه أن يتصدق بجنس ما تجب فيه الزكاة
ومن نذر أن يتصدق بملكه لزمه أن يتصدق بالجميع ويقال له أمسك منه مقدار ما تنفقه
على نفسك وعيالك إلى أن تكسب مالا فإذا اكتسبت مالا تصدق بمثل ما أمسكت

If a person makes a vow to donate his 'wealth' to charity he shall be required to give in charity those assets in which *zakāh* is obligatory.[712] If a person makes a vow to donate his 'possessions' to charity he shall be required to donate everything[713] and it shall be said to him, 'Keep that amount which you could spend on yourself and your dependants[714] until you earn (more)

[709] The difference between charity and a gift is that in an act of charity the intention of the giver is to earn the pleasure of Allāh Taʿāla whereas in a gift the giver's intention is to show friendship and to honour the recipient. Legally the transaction is the same except in a few instances as mentioned in the text.

[710] This is because the goal in charity is one, Allāh Taʿāla, and the poor person is merely the representative of Allāh to receive it.

[711] Since the purpose, which is reward, has been attained, retraction is not permitted.

[712] Although the Arabic word '*māl*', which means 'wealth', refers to all types of assets, this is confined, on the basis of juristic equity, to only those assets in which *zakāh* is obligatory, likening the obligation he imposed on himself, through the vow, to the obligation imposed by Allāh i.e. *zakāh*.

[713] In this case, he used the Arabic word '*milk*' which refers to everything he owns.

[714] In order to protect him from harm and suffering, the Sharīʿa gives preference to his needs first and allows him to retain the amount he requires. This amount may differ from person to person, depending on the type of occupation he has and when he expects to receive income to replace what he retained.

wealth. Once you earn (more) wealth you must give in charity the equivalent of what you had retained.'

كتاب الوقف
Chapter: *Waqf* (Endowment)

لا يزول ملك الواقف عن الوقف عند أبي حنيفة إلا أن يحكم به الحاكم أو يعلقه بموته فيقول إذا مت فقد وقفت داري على كذا وقال أبو يوسف يزول الملك بمجرد القول وقال محمد لا يزول الملك حتى يجعل للوقف وليا ويسلمه إليه

Ownership of the endower (*wāqif*) over the endowment (*waqf*) shall not cease [715] according to Imām Abū Ḥanīfa unless a judge passes judgment for the same[716] or the endower suspends it with his death and says, 'When I die, I have endowed my house for such (purpose).[717]' According to Imām Abū Yūsuf ownership shall cease by the mere pronouncement. According to Imām Muḥammad ownership shall not cease until he appoints a trustee for the endowment and hands it over to him.

وإذا صح الوقف على اختلافهم خرج عن ملك الواقف ولم يدخل في ملك الموقوف عليه

Once the endowment becomes valid – according to the differing opinions[718] – it shall leave the ownership of the endower[719] but shall not enter into the ownership of the endowee.

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[715] According to Imām Abū Ḥanīfa an endowment is not binding and may be retracted by the endower at any time.

[716] When a judge, appointed by the state, passes judgment in this matter based on a differing view, Imām Abū Ḥanīfa accepts that the endowment in such instance shall become binding e.g. if the endower wishes to retract the endowment after having handed it over to the appointed trustee but this is opposed in court and judgement of its being binding is passed.

[717] In such a case this will be deemed a bequest (*waṣiyya*.)

[718] As mentioned in the previous paragraph.

[719] The endowment will be held as being in the ownership of Allah in terms of the law.

ووقف المشاع جائز عند أبي يوسف وقال محمد لا يجوز

The endowment of common property[720] shall be valid according to Imām Abū Yūsuf but not according to Imām Muḥammad.

ولا يتم الوقف عند أبي حنيفة ومحمد حتى يجعل آخره لجهة لا تنقطع أبدا
وقال أبو يوسف إذا سمى فيه جهة تنقطع جاز وصار بعدها للفقراء وإن لم يسمهم

The endowment shall not be complete according to Imām Abū Ḥanīfa and Imām Muḥammad unless he specifies its culmination in an avenue that does not ever terminate.[721] According to Imām Abū Yūsuf if he mentions an avenue that terminates it shall also be valid and the endowment shall thereafter devolve to the poor even though he did not mention them.[722]

ويصح وقف العقار ولا يجوز وقف ما ينقل ويحول
وقال أبو يوسف إذا وقف ضيعة ببقرها وأكرتها وهم عبيده جاز
وقال محمد يجوز حبس الكراع والسلاح

The endowment of immovable property shall be valid. The endowment of movable property shall not be valid.[723] According to Imām Abū Yūsuf, if a

[720] *Mushāʿ* refers to common property in which a person holds an undivided interest e.g. a percentage share held in immovable property. In this instance it refers to common property that can be divided. The endowment of common property that is not divisible is valid even according to Imām Muḥammad.

[721] A requirement for the validity of an endowment is that it must be perpetual. It is therefore necessary that the eventual beneficiaries must not terminate. For example he must specify that the endowment will eventually devolve to the poor and needy. If this is not specified it would imply that the endowment is not perpetual and will therefore not be valid according to Imām Abū Ḥanīfa and Imām Muḥammad.

[722] According to Imām Abū Yūsuf the endowment will be a perpetual and will devolve to the perpetual avenue of the poor even if the endower does not stipulate this.

[723] Since movables are not everlasting it is not possible to endow them as the

person endows land together with its cattle and its labourers, who are his slaves, it shall be valid.[724] According to Imām Muḥammad, it shall also be valid to make an endowment of horses and weapons.[725]

وإذا صح الوقف لم يجز بيعه ولا تمليكه إلا أن يكون مشاعا عند أبي يوسف فيطلب الشريك القسمة فتصح مقاسمته

Once the endowment is valid it may not be sold or transferred unless it was common property, according to Imām Abū Yūsuf, and the partner requests for division. In such a case division with the partner shall be valid.[726]

والواجب أن يبدأ من ريع الوقف بعمارته شرط الواقف ذلك أو لم يشرط

It is necessary that the proceeds of the endowment be first applied to its maintenance, whether the endower stipulated this or not.[727]

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condition of perpetuity is not met. However there are a few exceptions to this rule according to Imām Abū Yūsuf and Imām Muḥammad as is mentioned in the text.

[724] In such a case the endowment of the movable items shall be valid as an extension of the validity of the endowment of the land itself.

[725] This is based on the narrations in this regard, in which the Prophet ﷺ said: "Khālid has detained his horses and armour in the path of Allah."

[726] Although *qisma* (division) contains an element of exchange, in terms of which the shares of one partner in one part are exchanged for the shares of the other in the other part, this will not be considered in the case of an endowment and the division shall be deemed a mere separation of shares, and will therefore be valid.

[727] Since the purpose of an endowment is for the proceeds to be used perpetually, and this is only possible if the property is suitably maintained, this will be deemed to be stipulated even if it was not mentioned by the founder.

وإن وقف دارا على سكنى ولده فالعمارة على من له السكنى فإن امتنع من ذلك
أو كان فقيرا أجرها الحاكم وعمرها بأجرتها فإذا عمرت ردها إلى من له السكنى

If a person endows a property for the residence of his children the duty of maintenance shall be on the one who has the right of residence.[728] If he refuses (to maintain it) or is (too) poor (to do so) the judge shall lease it out and maintain it from the rental (received). Once it is maintained he shall return it to the person who has the right of residence.[729]

وما انهدم من بناء الوقف وآلته صرفه الحاكم في عمارة الوقف إن احتاج إليه
وإن استغنى عنه أمسكه حتى يحتاج إلى عمارته فيصرفه فيها
ولا يجوز أن يقسمه بين مستحقي الوقف

The judge shall apply any part of the endowment building or its implements that collapse to the maintenance of the endowment if required. If there is no need for it he shall retain it until there is such a maintenance requirement.[730] It shall not be valid to distribute the same amongst the beneficiaries of the endowment.[731]

وإذا جعل الواقف غلة الوقف لنفسه أو جعل الولاية إليه جاز عند أبي يوسف

If the endower allocates the proceeds of the endowment to himself or appoints himself as the trustee thereof, this shall be valid according to Imām Abū Yūsuf.

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[728] Since he is the beneficiary of the endowment it shall be his responsibility to maintain it.

[729] In doing so, both the right of the endower, by perpetuating his endowment, as well as that of the beneficiary, through the continuation of his residence, are maintained.

[730] In the event that such items are not able to be reused in the building, they may be sold and the proceeds thereof will be used for the costs of the repair.

[731] The beneficiaries are only entitled to the usufruct of the endowment and not the actual corpus of the endowment.

وإذا بنى مسجدا لم يزل ملكه عنه حتى يفرزه عن ملكه بطريقه
ويأذن للناس بالصلاة فيه فإذا صلى فيه واحد زال ملكه عنه عند أبي حنيفة ومحمد
وقال أبو يوسف يزول ملكه عنه بقوله جعلته مسجدا

If a person builds a mosque, his ownership shall not cease until he detaches it from his property with its own access[732] and allows people to offer prayers therein.[733] When one person offers prayers therein his ownership shall cease according to Imām Abū Ḥanīfa and Imām Muḥammad. According to Imām Abū Yūsuf, his ownership shall cease by his pronouncement, 'I have made it a mosque.'[734]

ومن بنى سقاية للمسلمين أو خانا يسكنه بنو السبيل أو رباطا أو جعل أرضه مقبرة
لم يزل ملكه عن ذلك عند أبي حنيفة حتى يحكم به حاكم
وقال أبو يوسف يزول ملكه بالقول وقال محمد إذا استقى الناس من السقاية
وسكنوا الخان والرباط ودفنوا في المقبرة زال الملك

If a person builds a watering place for the Muslims, a lodge for travellers to reside in or a shelter; or makes his land into a graveyard, his ownership shall not cease according to Imām Abū Ḥanīfa unless a judge passes judgment for the same. According to Imām Abū Yūsuf, his ownership shall cease by his pronouncement. According to Imām Muḥammad, once people draw water from the watering place, reside in the lodge and shelter, and bury in the graveyard his ownership shall cease.[735]

[732] This will make the property solely for Allah.
[733] Offering prayers there will constitute the hand-over required for the validity of the endowment according to Imām Abū Ḥanīfa and Imām Muḥammad.
[734] Hand-over is not a requirement for endowments according to Imām Abū Yūsuf.
[735] In this case, each of the three Imāms adheres to his principle position regarding endowments.

كتاب الغصب
Chapter: *Ghaṣb* (Usurpation)

ومن غصب شيئا مما له مثل فهلك في يده فعليه ضمان مثله
وإن كان مما لا مثل له فعليه قيمته يوم الغصب

If a person usurps anything that has an equivalent[736] and it is destroyed in his hand, he shall be liable for compensation of its equivalent.[737] If it was something that does not have an equivalent, he shall be liable for its value[738] on the day of the usurpation.

وعلى الغاصب رد العين المغصوبة فإن ادعى هلاكها حبسه الحاكم
حتى يعلم أنها لو كانت باقية لأظهرها ثم قضى عليه ببدلها

The usurper shall be required to return the usurped item.[739] If he claims its destruction, the judge shall detain him until it is certain that had it been in existence he would have disclosed it. Thereafter, he shall pass judgement against him for its replacement.[740]

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[736] This refers to fungible items such as wheat and barley that are sold by measure of volume or weight.

[737] By replacing the item with another item, consideration is given as far as possible to both its tangible (form) and intangible (value) equivalent, which is the ideal.

[738] Since it is not possible to give consideration to the form in non-fungible items, due to the significant difference between items of that type or species, the value is taken into consideration.

[739] As long as the item is existing, the usurper is obligated to return the item itself to the owner.

[740] The replacement will be either its equivalent or the value thereof.

والغصب فيما ينقل ويحول

Usurpation shall occur in movable items.[741]

وإذا غصب عقارا فهلك في يده لم يضمنه عند أبي حنيفة و أبي يوسف
وقال محمد يضمنه كهدمه وما نقص منه بفعله وسكناه ضمنه في قولهم جميعا

If a person usurps immovable property and it is destroyed in his hand,[742] he shall not be liable for the same according to Imām Abū Ḥanīfa and Imām Abū Yūsuf.[743] According to Imām Muḥammad he shall be liable. He shall however be liable for any damage that occurs to it by his action and his occupancy according to all three Imāms.

وإذا هلك المغصوب في يد الغاصب بفعله أو بغير فعله فعليه ضمانه
وإن نقص في يده فعليه ضمان النقصان

If the usurped item is destroyed in the hand of the usurper, whether by his action or not, he shall be liable for compensation. If the item is damaged in his hand he shall be liable for such damages.[744]

[741] Legally, usurpation can only take place in movable items and cannot occur in immovable property.

[742] This refers to its being destroyed not by his action e.g. if it is ruined in a flood or earthquake.

[743] The two senior Imams do not regard usurpation to have legally occurred in immovable property as their legal definition of usurpation, which is removing an item from the hand of the owner, is not found.

[744] Once the usurped item comes into the possession of the usurper he becomes liable for anything that happens to it even if not by his action. However, if the damage was caused by a third party he shall have the right to claim from that third party the amount that he was liable for to the owner.

ومن ذبح شاة غيره فمالكها بالخيار إن شاء ضمنه قيمتها وسلمها إليه وإن شاء ضمنه نقصانها ومن خرق ثوب غيره خرقا يسيرا ضمن نقصانه وإن خرقه خرقا كثيرا يبطل عامة منفعته فلمالكه أن يضمنه جميع قيمته

If a person slaughters the sheep of another person, the owner shall have the option of holding him liable for the (full) value of it and handing it over to him,[745] or of holding him liable for the damage (only).[746] If someone tears the garment of another person slightly he shall be liable for the damage. If he tears it so substantially that it eliminates its general purpose, the owner shall have the right to hold him liable for the full value.[747]

وإذا تغيرت العين المغصوبة بفعل الغاصب حتى زال اسمها وأعظم منافعها زال ملك المغصوب منه عنها وملكها الغاصب وضمنها ولم يحل له الانتفاع بها حتى يؤدي بدلها وهذا كمن غصب شاة فذبحها وشواها أو طبخها أو غصب حنطة فطحنها أو حديدا فاتخذه سيفا أو صفرا فعمله آنية

If the usurped item changes by the action of the usurper such that it loses it name and its main uses, the person from whom it was usurped shall lose ownership of the item and the usurper shall become the owner of the same.[748] He (however) shall not be allowed to use it until he discharges the

[745] Since slaughtering the sheep can be deemed destruction from one angle as a number of other uses of the animal are lost, he may hold him liable for the full value.

[746] It is also possible to deem the slaughtering to be impairment (only) and not destruction as the meat of the sheep can still be used.

The principle is that the full value of the item can be claimed in cases of destruction, in which case the item will be handed over to the person paying the liability and will become his, while in the case of impairment, it may be retained and damages may be claimed. In some cases, such as the case of the sheep discussed here, it is possible to either deem it a destruction or impairment, and the owner is given the right to choose either option.

[747] In this case too, as in the case of the sheep, the owner has the option of deeming it destruction and claiming the full value, or of retaining the item and claiming for the damage.

[748] In this instance, the owner does not have the option of retaining the item and

replacement. E.g. If a person usurps a sheep which he slaughters and roasts or cooks; or if a person usurps wheat which he grinds, or iron which he makes into a sword, or brass which he makes into a utensil.[749]

وإن غصب فضة أو ذهبا فضربها دنانير أو دراهم أو آنية
لم يزل ملك مالكها عنها عند أبي حنيفة

If a person usurps silver or gold[750] and then makes it into dirham or dīnār coins or into a utensil, the owner shall not lose ownership of the same according to Imām Abū Ḥanīfa.[751]

ومن غصب ساجة فبنى عليها زال ملك مالكها عنها ولزم الغاصب قيمتها

If a person usurps wood[752] and builds upon it the owner shall lose ownership[753] of the same and the usurper shall be liable for its value.

ومن غصب أرضا فغرس فيها أو بنى قيل له اقلع الغرس والبناء وردها فارغة
فإن كانت الأرض تنقص بقلع ذلك فللمالك أن يضمن له
قيمة البناء والغرس مقلوعا فيكون له

If a person usurps land and plants trees in it or builds (on it) he shall be

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claiming damages.

[749] In all these cases, the owner cannot choose to take the item back as the work of the usurper, albeit unlawful, has added value to the item. This value-add action by the usurper, in a manner that alters the name of the item, becomes the means of his acquiring ownership of the item. However, even though he becomes the owner, it is unlawful for him to use the item until he compensates the original owner for it.

[750] This refers to gold or silver nuggets.

[751] Imām Abū Ḥanīfa considers the item not to have changed as many of the Sharīʿa laws that apply to gold (e.g. *zakāh*, *ṣarf*) are still applicable.

[752] The Arabic word, *sāja*, refers to a type of wood that grows in India.

[753] Once the wood is used in the foundation of the building it is deemed to have become something else and the owner loses ownership of it. In addition, removing it, at this stage will result in damage to the structure.

ordered to remove the trees and building and return the land vacant. If the land would be damaged by removal of the same, the owner shall have the right to compensate the usurper for the value of the building or trees razed[754] and assume ownership thereof.

ومن غصب ثوبا فصبغه أحمر أو سويقا فلته بسمن فصاحبه بالخيار
إن شاء ضمنه قيمة ثوب أبيض ومثل السويق وسلمها للغاصب
وإن شاء أخذهما وضمن ما زاد الصبغ والسمن فيهما

If a person usurps a garment and dyes it red or (usurps) crushed wheat and mixes it with ghee, the owner shall have the option of either holding him liable for the value of a white garment or the equivalent quantity of crushed wheat and handing the same (modified garment or wheat) over to the usurper, or of taking them and paying compensation[755] for the value added to them by the dye or the ghee.

ومن غصب عينا فغيبها فضمنه المالك قيمتها ملكها الغاصب والقول في القيمة
قول الغاصب مع يمينه إلا أن يقيم المالك البينة بأكثر من ذلك فإن ظهرت العين
وقيمتها أكثر مما ضمن وقد ضمنها بقول المالك أو ببينة أقامها أو بنكول الغاصب
عن اليمين فلا خيار للمالك وإن كان ضمنها بقول الغاصب مع يمينه فالمالك بالخيار
إن شاء أمضى الضمان وإن شاء أخذ العين ورد العوض

If a person usurps an item and hides it and the owner thereafter makes him

[754] This is the value of the building or tree as it stands on the land being liable for demolition or uprooting and is calculated by evaluating the land without the tree or building and then evaluating it with the tree or building that is liable for uprooting or demolition. The difference between the two values is what the owner will pay. E.g. If the value of the land without the building is 1000; the value of the land with the building standing is 2000; and the value of the land with the building liable for demolition is 1700 (the demolition cost being 300), the owner will pay him 700 (1700-1000) as compensation.

[755] Compensation has to be paid in consideration of the right of the usurper to the value added by his action of dying the garment or mixing ghee into the wheat.

liable for the value thereof, the usurper shall become the owner of the same.[756] The statement of the usurper supported by his oath shall be accepted[757] with respect to the value unless the owner provides evidence for a higher value. If the article emerges and its value is greater than the compensation paid, while such compensation was paid on the basis of the owner's statement, evidence provided by him or the usurper's failure to swear the oath, the owner shall have no option.[758] If the usurper had paid the compensation based on his statement and oath, the owner shall have the option of allowing such compensation or of taking the article and returning the compensation.[759]

وولد المغصوبة ونماؤها وثمرة البستان المغصوب أمانة في يد الغاصب
فإن هلك فلا ضمان عليه إلا أن يتعدى فيها أو يطلبها مالكها فيمنعها إياه

The child and growth[760] of the usurped item and the fruit of a usurped garden are a trust[761] in the hand of the usurper. If it is destroyed there shall be no liability on him unless he is guilty of misconduct therein or the owner demands it and he refuses to give it to him.[762]

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[756] Once the owner takes the replacement (the equivalent item or value) from the usurper he loses ownership of the usurped item as he cannot have ownership of both exchanges viz. the usurped item as well as its replacement.

[757] Since the usurper is the one denying the higher value, his statement is accepted according to the legal principle that the 'statement of the denier shall be accepted.'

[758] This is because there is clear indication of the owner's consent at the time of accepting compensation, as he had claimed this value.

[759] In this case he is given the option of returning the compensation he received as he was compelled to accept it based on the statement of the usurper.

[760] Growth refers to any increase within the item, such as size or beauty, as well things produced by the item, such as milk.

[761] These items are not deemed to have been legally usurped and therefore remain a trust for which the usurper is not liable unless he is guilty of misconduct in them e.g. by destroying or consuming them.

[762] By refusing to hand it over to the owner upon his request, he is deemed to have usurped the item.

وما نقصت الجارية بالولادة في ضمان الغاصب فإن كان في قيمة الولد وفاء به جبر النقصان بالولد وسقط ضمانه عن الغاصب

Any loss to a slave-girl by (the process of) childbirth shall be the liability of the usurper. If the value of the child is sufficient to compensate for the same, the loss shall be offset by the child and the liability shall fall off from the usurper.[763]

ولا يضمن الغاصب منافع ما غصبه إلا أن ينقص باستعماله فيغرم النقصان

The usurper shall not be liable for the benefits[764] of what he usurped unless it is damaged by his use thereof, in which case he shall be liable for the loss.

وإذا استهلك المسلم خمر الذمي أو خنزيره ضمن قيمتهما وإن استهلكهما المسلم على المسلم لم يضمن

If a Muslim destroys the wine or pig of a *dhimmī* he shall be liable[765] for the value thereof. If a Muslim destroys such items belonging to another Muslim he shall not be liable.[766]

[763] Since the cause for the damage and the growth or increase was the same (i.e. childbirth), one can be offset by the other.

[764] Benefits refer to uses that are intangible such as riding of an animal or occupancy of a house. These intangible benefits only come into existence by the action of the usurper when the usurped property is in his possession and are therefore founded in his ownership. Hence, there is no liability for such benefits. However, the jurists have specifically made an exception in three cases: i) When the property is an endowment (*waqf*); ii) When the property belongs to an orphan; and iii) When the property is designed or purchased for the purpose of earning revenue. In these three cases the usurper shall be liable for the market rental of such property.

[765] Since these items are legal for *dhimmīs* and are regarded to be items of value (as discussed in the chapter on the invalid sale) there shall be liability for the same.

[766] This is because such items are not legal for a Muslim to own and are not regarded to have any value with respect to him. There is therefore no liability.

كتاب الوديعة
Chapter: *Wadīʿa* (Deposit)

الوديعة أمانة في يد المودع إذا هلكت لم يضمنها

The deposited item (*wadīʿa*) shall be held in a fiduciary capacity by the one with whom it is deposited (the *mūdaʿ* or depositee). If it gets destroyed he shall not be liable for it.

وللمودع أن يحفظها بنفسه وبمن في عياله فإن حفظها بغيرهم أو أودعها ضمن
إلا أن يقع في داره حريق فيسلمها إلى جاره أو يكون في سفينة يخاف الغرق
فيلقيها إلى سفينة أخرى

The depositee may guard the item himself and by (means of) those who are in his family.[767] If he guards it by (means of) or deposits it with others he shall be liable, unless a fire occurs in his house and he hands it over to his neighbour, or he is in a ship that he fears will sink and therefore throws it into another ship.[768]

وإن خلطها المودع بماله حتى لا تتميز ضمنها فإن طلبها صاحبها فحبسها عنه
وهو يقدر على تسليمها ضمنها وإن اختلطت بماله من غيره فعله فهو شريك لصاحبها

If the depositee mixes the item with his own assets such that the deposited item can no longer be distinguished he shall be liable.[769] If the owner

[767] The depositee must guard the item just as he would normally guard his own items. Since he obviously cannot be expected to remain at home all the time, nor take the item with him wherever he goes, he is allowed to store the item for safekeeping with members of his family who live with him.

[768] In exceptional circumstances, such as the ones described in the text, the depositee is permitted to hand the item to others.

[769] The deposited item must be kept separately and the depositee is not permitted to

requests for the item and the depositee withholds it from him, whilst being able to hand it over, he shall be liable.[770] If the deposited item gets mixed with the assets of the depositee without any action of his, he shall become a partner[771] with the owner.

وإن أنفق المودع بعضها ثم رد مثله فخلطه بالباقي ضمن الجميع

If the depositee spends a part of the deposited item[772] and thereafter replaces the equivalent amount of the same and mixes it with the remainder he shall be liable for the entire amount.[773]

وإذا تعدى المودع في الوديعة بأن كانت دابة فركبها أو ثوبا فلبسه أو عبدا فاستخدمه أو أودعها عند غيره ثم أزال التعدي وردها إلى يده زال الضمان فإن طلبها صاحبها فجحدها إياه فهلكت ضمنها فإن عاد إلى الاعتراف لم يبرأ من الضمان

If the depositee transgresses in the deposited item - by riding it in the case of animal, wearing it in the case of a garment, taking service from it in the case of a slave or if he deposits it with someone else, and thereafter abandons the transgression and returns the item to his hand (for safekeeping) the liability shall cease. If the owner requests for the item and the depositee denies having taken possession thereof and the item is

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use the item or commingle it with his assets.

[770] When the owner request for the item to be returned to him it is clear that he no longer consents to the item being held by the one with whom it was deposited. Therefore the depositee's withholding the item any further results in liability on his part as this is without the owner's consent.

[771] In such a situation the depositee cannot be held liable as this occurred without any action of his. Instead the depositee and the depositor become joint owners in the commingled assets.

[772] For e.g. if the deposited item was dirhams, the depositee is obliged to retain those very same coins and is not permitted to spend it.

[773] If the depositee spends a few of those coins and then replaces them with other coins which he mixes with the remainder of the coins in such a way that the coins replaced and the original coins cannot be distinguished, the depositee becomes liable for the entire amount in the event of destruction.

subsequently destroyed, he shall be liable. If he thereafter[774] acknowledges (holding the item) he shall not be absolved of the liability.[775]

وللمودع أن يسافر بالوديعة وإن كان لها حمل ومؤنة

The depositee may travel with the deposited item even if it involves transport costs.[776]

وإذا أودع رجلان عند رجل وديعة ثم حضر أحدهما فطلب نصيبه منها لم يدفع إليه شيئا حتى يحضر الآخر عند أبي حنيفة وقال أبو يوسف و محمد يدفع إليه نصيبه

If two people deposit an item[777] with one person and thereafter one of them comes and demands his share of the item, he shall not (be liable to) give anything to him until the other is present according to Imām Abū Ḥanīfa.[778] According to Imām Abū Yūsuf and Imām Muḥammad he shall (be liable to) give his share to him.[779]

وإن أودع رجل عند رجلين شيئا مما يقسم لم يجز أن يدفعه أحدهما إلى الآخر
ولكنهما يقتسمانه فيحفظ كل واحد منهما نصفه
وإن كان مما لا يقسم جاز أن يحفظه أحدهما بإذن الآخر

If one person deposits something with two people one of them may not give

[774] i.e. after having denied taking possession

[775] This is because his denial after the owner's request for the item renders the transaction cancelled. His acknowledgement thereafter is of no value.

[776] This is the view of Imām Abū Ḥanīfa only. His two students, however, differ with him on this issue because if the depositee travels with the item, this may cause the depositor to incur costs in retrieving the item.

[777] This refers to a fungible item such as wheat, barley etc.

[778] Since his share is held in common (*mushāʿ*) it is not possible to give it to him unless the item is divided. This can only be done in the presence of the other partner.

[779] In the case of fungible items, Imām Abū Yūsuf and Imām Muḥammad allow the division to take place in the absence of the other partner.

it to the other but they shall divide it and each of them shall keep half.[780] If it is something that cannot be divided, one of them may keep it with the consent of the other.[781]

وإذا قال صاحب الوديعة للمودع لا تسلمها إلى زوجتك فسلمها إليها لم يضمن
وإن قال له احفظها في هذا البيت فحفظها في بيت آخر من الدار لم يضمن
وإن حفظها في دار أخرى ضمن

If the owner of the deposited item says to the depositee, 'Don't give it to your wife,' and he gives it to her, he shall not be liable.[782] If he says to him, 'Keep it in this room,' and he keeps it in another room of the (same) house he shall not be liable.[783] If he keeps it in another house he shall be liable.[784]

[780] This is because it is apparent that the owner did not consent to only one of them keeping it, otherwise he would have deposited it with him only.

[781] Since the owner was aware that the item cannot be divided and because it is not reasonable to expect the two depositees to remain together always, it is assumed that the owner has consented to only one of them keeping it in this instance.

[782] This is because it is not possible for the depositee to abide by this condition as everything in his house is kept by his wife when he leaves the house.

[783] The stipulation of keeping it in a certain room of the house as opposed to another is of no benefit as two rooms in one house are generally the same in terms of security. This condition is therefore disregarded.

[784] In this case, he shall be liable if anything happens to the item because two separate houses are considered to be different in terms of security.

كتاب العارية
Chapter: ʿĀriyya (Loan for Use[785])

العارية جائزة وهي تمليك المنافع بغير عوض

A loan for use shall be valid[786] and is the transfer of ownership of benefits for no consideration (in exchange).

وتصح بقوله أعرتك وأطعمتك هذه الأرض ومنحتك هذا الثوب
وحملتك على هذه الدابة إذا لم يرد به الهبة وأخدمتك هذا العبد
وداري لك سكنى وداري لك عمرى سكنى

It shall be valid with the words, 'I have lent you,' 'I have fed you this land[787],' 'I have granted you this garment,' 'I have carried you onto this animal,' if he does not intend a gift[788], 'I have given you the service of this slave,' 'My house is for you to reside[789],' or 'My house is for you for life to reside.'

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[785] 'Loan for use' is an express or implied contract under which a lender hands over an asset to a borrower. The borrower is obligated to use the asset only for its normal and proper purpose or as specified by the lender, and return it within a specified or reasonable period.

[786] The transaction is acceptable in Sharīʿa as evidenced by the action of the Prophet ﷺ himself during the battle of Ḥunayn when he borrowed armour from Ṣafwān ibn Umayya.

[787] Since the land itself cannot be eaten it is obviously a figurative reference to the benefits or the proceeds of the land.

[788] Since these words could also mean a gift we apply the meaning that is of a lesser impact i.e. the meaning of *ʿāriyya*, which is the transfer of benefits only rather than the transfer of ownership of the article together with its benefits, as occurs in a gift unless the speaker indicates his actual intention.

[789] The addition of the words 'to reside' makes the intention of the speaker clear.

وللمعير أن يرجع في العارية متى شاء

The lender may retract the loan whenever he wishes.[790]

والعارية أمانة إن هلكت من غير تعد لم يضمن شيئا

The item loaned is a trust and if it gets destroyed without any wrongdoing (on his part) he shall not be liable for anything.

وليس للمستعير أن يؤاجر ما استعاره ولا أن يرهنه
وله أن يعيره إذا كان مما لا يختلف باختلاف المستعمل

The borrower may not lease what he has borrowed and nor pledge the same.[791] He may lend it out if it is an item that does not vary with a change in the user.[792]

وعارية الدراهم والدنانير والمكيل والموزون قرض

The loan for use[793] of dirhams, dīnārs and items measured by volume or weight shall be a loan (*qarḍ*).

[790] In others words the loan for use is not binding and maybe withdrawn at any time by the lender.

[791] Since a lease and pledge are binding contracts and the loan for use is not, it will not be possible for the borrower to enter into such binding contracts even though he owns the benefits of the item.

[792] This is because the owner has consented to his use and not that of anyone else.

[793] Since these items cannot be 'used' without being consumed or 'used up' they are technically not *ʿāriyya* (loan for use) and are classified as *qarḍ* (loan.) The difference is that in an *ʿāriyya* the same item is returned after being used whereas in a *qarḍ* the item itself is not returned but its equivalent.

وإذا استعار أرضا ليبني فيها أو يغرس نخلا جاز وللمعير أن يرجع فيها
ويكلفه قلع البناء والغرس فإن لم يكن وقت العارية فلا ضمان عليه
وإن كان وقت العارية فرجع قبل الوقت ضمن المعير ما نقص البناء والغرس بالقلع

If a person borrows land to build or to plant date-palms on, it shall be valid. The lender may retract the same and impose on him to remove the building and trees. If he had not fixed a period for the loan for use there shall be no liability on him. If he had fixed a period and retracts prior to the expiry thereof the lender shall be liable[794] for the damages to the building and trees as a result of the removal.

وأجرة رد العارية على المستعير وأجرة رد العين المستأجرة على المؤجر
وأجرة رد العين المغصوبة على الغاصب

The fee for returning a loaned article shall be payable by the borrower. The fee for returning a leased article shall be payable by the lessor. The fee for returning a usurped article shall be payable by the usurper.

[794] Although a loan for use is not binding, the fixing of the period by the lender is deemed to be a promise that creates a moral obligation of fulfilment and makes him liable for the arising damages should he rescind on the promise since he is deemed to have deceived the borrower by making such a promise.

وإذا استعار دابة فردها إلى إصطبل مالكها لم يضمن وإذا استعار عينا فردها إلى دار مالكها ولم يسلمها إليه ضمن وإن رد الوديعة إلى دار المالك ولم يسلمها إليه ضمن

If a person borrows an animal and returns it to the stable of the owner he shall not be liable.[795] If a person borrows an article[796] and returns it to the house of the owner but does not hand it over to him he shall be liable. If he returns a deposited item to the owner's house and does not hand it to the owner (himself) he shall be liable.[797]

[795] Although he did not actually return the item to the owner personally, he is not held liable on the basis of *istiḥsān* as he did what the owner would have ordinarily done had he handed it to him personally.

[796] This refers to a precious article. If the article was not of significant value (e.g. a broom) he is not liable by returning it to the house of the owner.

[797] The fact that the owner deposited the item with him for safekeeping is indicative that he is not happy with its being returned to his house or handed over to any other person, even though they may be from his family.

كتاب اللقيط
Chapter: *Laqīṭ* (Foundling)

اللقيط حر مسلم ونفقته من بيت المال

The foundling[798] shall be a free[799] Muslim[800] and his expenses shall be from the state treasury.[801]

فإن التقطه رجل لم يكن لغيره أن يأخذه من يده

If someone takes him no other person shall have the right to take him away from his hand.

فإن ادعى مدع أنه ابنه فالقول قوله وإن ادعاه اثنان ووصف أحدهما
علامة في جسده فهو أولى به

If anyone claims that the foundling is his son, his statement shall be accepted.[802] If two people claim him and one of them describes a mark on his body he shall be more eligible to (take) him.

وإذا وجد في مصر من أمصار المسلمين أو في قرية من قراهم فادعى ذمي أنه ابنه
ثبث نسبه منه وكان مسلما وإن وجد في قرية من قرى أهل الذمة
أو في بيعة أو كنيسة كان ذميا

If he is found in a Muslim city or village and a *dhimmī* claims that he is his

[798] A foundling is a new born child abandoned by its family on grounds of poverty, shame or any other reason.
[799] The original status in all human beings is that they are born free.
[800] Being found in a Muslim land, he is automatically deemed to be Muslim.
[801] Since he has no known family the state treasury shall take care of him.
[802] Establishing paternity in this case for the child is in his best interests.

son, his lineage shall be established to him and he shall be (deemed) a Muslim.[803] If he is found in a village of the *Ahl al-dhimma* or in a synagogue or church he shall be (deemed) a *dhimmī*.[804]

ومن ادعى أن اللقيط عبده لم يقبل منه فإن ادعى عبد أنه ابنه
ثبت نسبه منه وكان حرا

If someone claims that the foundling is his slave, such statement shall not be accepted from him.[805] If a slave claims that he is his son, his lineage shall be established to him and he shall be (deemed) a freeman.

وإن وجد مع اللقيط مال مشدود عليه فهو له

If some wealth is found tied to the foundling it shall belong to him.

ولا يجوز تزويج الملتقط ولا تصرفه في مال اللقيط ويجوز أن يقبض له الهبة
ويسلمه في صناعة ويؤاجره

The person who takes him shall not be permitted[806] to marry him off or to transact in the wealth of the foundling. He may take possession of a gift on his behalf, hand him over to a trade and hire him out.[807]

[803] This is done on the basis of juristic equity in accordance to what is in the child's best interests.
[804] *Ahl al-dhimma or dhimmīs* refer to non-Muslim subjects living in a Muslim country.
[805] Since the default in all human beings is that they are free this claim can only be accepted with evidence.
[806] In other words he is not granted the status of being the legal guardian (*waliyy*) of such minor, and therefore will not have the authority to marry him off or to invest his wealth.
[807] These things are purely beneficial for the foundling and are therefore allowed.

كتاب اللقطة
Chapter: *Luqaṭa* (Lost Item)

اللقطة أمانة إذا أشهد الملتقط أنه يأخذها ليحفظها ويردها على صاحبها

A lost item shall be (held in) trust if the person who finds it calls witnesses (to the fact) that he is taking it to look after it[808] and return it to its owner.

فإن كانت أقل من عشرة دراهم عرفها أياما وإن كانت عشرة فصاعدا عرفها حولا

If it is less than ten dirhams he shall publicise[809] it for a few days. If it is ten dirhams or more he shall publicise it for one year.[810]

فإن جاء صاحبها وإلا تصدق بها فإن جاء صاحبها فهو بالخيار
إن شاء أمضى الصدقة وإن شاء ضمن الملتقط

If the owner comes (it shall be given to him), if not he shall give it away as charity. If the owner comes (thereafter) he shall have the option of allowing the charity[811] if he wishes or holding the finder liable if he wishes.[812]

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[808] It is recommended to pick up a lost item and look after it until the owner is identified as this entails protection of the wealth of another person.

[809] This means he must announce it at the place he found it and at other places where people gather such as the market, outside the mosque etc.

[810] The general rule that is practised on in the Ḥanafī School is that he should publicise it for a period of time until it becomes probable that the owner will not search for it after such time. This period may differ from item to item.

[811] In this case he will be entitled to the reward for such charity.

[812] This is because the finder gave away his item without his consent. If he can locate the person to whom the item was given, he may take it away from him or hold him liable if the item was destroyed or consumed.

ويجوز الالتقاط في الشاة والبقرة والبعير فإن أنفق الملتقط عليها بغير إذن الحاكم
فهو متبرع وإن أنفق بأمره كان ذلك دينا على مالكها

It shall be valid to take a (lost) sheep, cow and camel.[813] If the finder spends on it without the permission of the judge he shall be deemed to have done so gratuitously. If he spends (based) on the order of the judge the amount spent shall be a debt on the owner.[814]

وإذا رفع ذلك إلى الحاكم نظر فيه فإن كان للبهيمة منفعة أجرها وأنفق عليها من أجرتها
وإن لم يكن لها منفعة وخاف أن تستغرق النفقة قيمتها باعها وأمره بحفظ ثمنها
وإن كان الأصلح الإنفاق عليها أذن له في ذلك وجعل النفقة دينا على مالكها
فإذا حضر مالكها فللملتقط أن يمنعه منها حتى يأخذ النفقة

When he raises the same to the judge he shall consider the matter. If the animal has some use he shall rent it out and spend on it from the rental. If it has no use and he fears that the expenses will encompass its value he shall sell it and order that the price realized be kept. If the best option is to spend on it he shall permit him to do so and shall make the expenses a debt on its owner. When the owner arrives the finder shall have the right to withhold[815] the animal from him until he receives the expenses.

[813] The Ḥanafīs apply the same rule to lost sheep, cattle and camels and regard it to be recommended to take them to look after them as this will protect them. However if there is no fear of any harm coming to them and it is expected that the owner will find them, then they should not be taken but left until the owner finds them.

[814] A legally appointed judge has the authority to act in the best interests of those who are absent and unable to act for themselves. Thus, his order is like that of the owner himself.

[815] Since this is a legally valid debt that is due to him, he shall have the right to withhold the animal in lieu of payment of the debt.

ولقطة الحل والحرم سواء

(The law for) a lost item outside the Sacred Precinct (*ḥaram*)[816] and within the Sacred Precinct shall be the same.

وإذا حضر الرجل فادعى أن اللقطة له لم تدفع إليه حتى يقيم البينة
فإن أعطى علامتها حل للملتقط أن يدفعها إليه ولا يجبر على ذلك في القضاء

If a person comes and claims that the lost item is his, it shall not be given to him unless he provides evidence.[817] If he describes a feature of the item, the finder shall be allowed to give it to him but shall not be compelled to do so in terms of the law.[818]

ولا يتصدق باللقطة على غني وإن كان الملتقط غنيا لم يجز له أن ينتفع بها
وإن كان فقيرا فلا بأس أن ينتفع بها ويجوز أن يتصدق بها إذا كان غنيا
على أبيه وابنه وأمه وزوجته إذا كانوا فقراء والله أعلم

A found item shall not be given in charity to a wealthy person. If the finder (himself) is wealthy he shall not be permitted to make use of the item. If he is poor there is no harm in his using the item.[819] It shall be valid for him to give it in charity, if he is wealthy, to his father, son, mother or wife if they are poor. Allah knows best.

[816] The Sacred Precinct or *ḥaram* refers to the area around the holy city of Makkah in Saudi Arabia.

[817] Just as in the case of any other claim, evidence is required.

[818] Merely describing a feature of the item is not sufficient evidence to prove ownership.

[819] In doing so there is consideration for both the finder and the owner.

كتاب الخنثى
Chapter: *Khunthā* (Hermaphrodite)

إذا كان للمولود فرج وذكر فهو خنثى فإن كان يبول من الذكر فهو غلام
وإن كان يبول من الفرج فهو أنثى وإن كان يبول منهما والبول يسبق من أحدهما
نسب إلى الأسبق فإن كانا في السبق سواء فلا عبرة بالكثرة عند أبي حنيفة
وقال أبو يوسف ومحمد ينسب إلى أكثرهما بولا

If a new-born has a vagina as well as a penis he shall be (deemed) a hermaphrodite. If he urinates from the penis he shall be (deemed) a male and if he urinates from the vagina he shall be (deemed) a female. If he urinates from both (organs) and the urine from one precedes the other he shall be attributed to the one that is first.[820] If there is no precedence then quantity shall not be taken into consideration according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad he shall be attributed to the organ that is more with respect to the quantity of urine.

وإذا بلغ الخنثى وخرجت له لحية أو وصل إلى النساء فهو رجل
وإن ظهر له ثدي كثدي المرأة أو نزل له لبن في ثديه أو حاض أو حبل
أو أمكن الوصول إليه من الفرج فهو امرأة

When the hermaphrodite reaches the age of puberty and his beard emerges or he has intercourse with a woman he shall be (deemed) a man.[821] If breasts like those of a woman appear on him, milk descends in his breast, he experiences menstruation, becomes pregnant or intercourse becomes possible with him in the vagina, he shall be (deemed) a woman.

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[820] Precedence is deemed to indicate the organ that is fundamental and the other organ is deemed superfluous.

[821] The same will apply if any other sign that is peculiar to men appears.

فإن لم تظهر إحدى هذه العلامات فهو خنثى مشكل

If none of these indications appear he shall be (termed) an obscure hermaphrodite[822] (*khunthā mushkil*.)

وإذا وقف خلف الإمام قام بين صف الرجال والنساء وتبتاع له أمة تختنه
إن كان له مال فإن لم يكن له مال ابتاع له الإمام من بيت المال
فإذا ختنته باعها ورد ثمنها إلى بيت المال

When he stands behind the imam (in prayer) he shall stand between the rows of the men and the women.[823] A slave-girl shall be purchased to circumcise him if he has wealth.[824] If he does not have wealth the judge (court) shall purchase one for him from the state treasury. Once she has circumcised him he shall sell her and return the purchase price to the state treasury.

[822] There are special laws for a *khunthā mushkil* and these are generally based on the principle of caution in religious matters as well as the principle of certainty and not establishing anything on the basis of doubt – as will be shown in the text.

[823] There is caution in this because as a man he cannot stand in the women's rows and as a woman he cannot stand in the men's rows.

[824] In this there is caution as an unmarried female slave is allowed to look at the private parts of her owner, male or female, for purpose of circumcision.

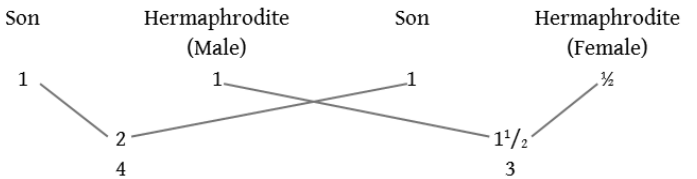
وإذا مات أبوه وخلف ابنا وخنثى فالمال بينهما عند أبي حنيفة على ثلاثة أسهم
للابن سهمان وللخنثى سهم وهو أنثى عنده في الميراث إلا أن يثبت غير ذلك فيتبع
وقال أبو يوسف ومحمد للخنثى نصف ميراث الذكر ونصف ميراث الأنثى
وهو قول الشعبي واختلفا في قياس قوله قال أبو يوسف المال بينهما على سبعة أسهم
للابن أربعة وللخنثى ثلاثة وقال محمد المال بينهما على اثني عشر منهما
للابن سبعة وللخنثى خمسة

If his father passes away and is succeeded by a son and a hermaphrodite the estate shall be divided between them, according to Imām Abū Ḥanīfa, in three shares: the son shall receive two shares and the hermaphrodite shall receive one share. He is (deemed to be) a female according to him in the matter of inheritance[825] unless it is established otherwise, in which case that shall be applied. According to Imām Abū Yūsuf and Imām Muḥammad the hermaphrodite shall receive half the inheritance of a male and half the inheritance of a female, as was the view of Imām Al-Shaʿbī.[826] They (however) differ with respect to the derivation of this view and according to Imām Abū Yūsuf the estate shall be divided between them in seven shares: the son shall receive four (shares) and the hermaphrodite shall receive three (shares.)[827]

[825] Since this amount of inheritance is certain, this is applied with respect to him.

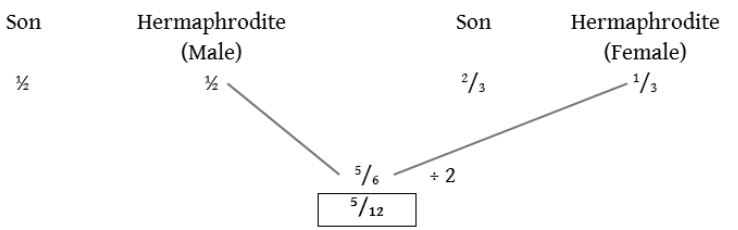
[826] ʿĀmir ibn Sharaḥīl al-Shaʿbī (d. *ca* 105 AH) was a Kufan scholar of ḥadīth and fiqh from amongst the Tābiʿīn.

[827] This is achieved by considering the share of the hermaphrodite in proportion to the share of the son in both instances and taking the sum of both proportions resulting in the share of the hermaphrodite being one and a half in proportion to two or 3:4 as illustrated in the diagram below:



According to Imām Muḥammad the estate shall be divided between them in twelve shares: the son shall receive seven (shares) and the hermaphrodite shall receive five (shares.)[828]

[828] This is achieved by adding the share of the hermaphrodite as a male (half of the whole) to his share as a female (one third of the whole) and dividing the sum by two giving a result of five twelfths.



كتاب المفقود
Chapter: *Mafqūd* (Missing Person)

إذا غاب الرجل ولم يعرف له موضع ولا يعلم أحي هو أم ميت نصب القاضي
من يحفظ ماله ويقوم عليه ويستوفي حقوقه وينفق على زوجته وأولاده من ماله

If a person disappears without his whereabouts being known and it is not certain whether he is alive or dead the judge shall appoint someone to look after his wealth, take charge of it, collect his dues and spend on his wife and children from his wealth.[829]

ولا يفرق بينه وبين امرأته

The judge shall not separate him and his wife.

فإذا تم له مائة وعشرون سنة من يوم ولد حكمنا بموته واعتدت امرأته
وقسم ماله بين ورثته الموجودين في ذلك الوقت ومن مات منهم قبل ذلك لم يرث منه

When one hundred and twenty years[830] from the date of his birth lapses we

[829] Those individuals entitled to maintenance in his presence shall be spent on in his absence. These include his wife, minor children, major female children, chronically ill children as well as parents.

[830] The evident Ḥanafī position (*ẓāhir al-riwāya*) is that this judgment shall be passed once all his contemporaries pass away. This period was later quantified as being ninety years for the purposes of fatwā. It is noteworthy that the great Ḥanafī scholar from the Indo-Pak subcontinent, Mawlāna Ashraf ʿAlī Thanwī, after several years of extensive consultations with muftīs in India and Mālikī scholars abroad, issued a ruling in 1931, in light of circumstances in India at the time, on the basis of the Mālikī view, which states that a period of four years should lapse after which the judge may issue such judgment. This ruling is contained in his detailed book titled *Al-Ḥīla al-Nājiza li l-Ḥalīla al-ʿĀjiza* (A Successful Legal Device for the Helpless Wife) which deals with problems related to the issue of judicial separation.

shall pass judgment on his death after which his wife shall observe the *ʿidda* (waiting period) and his wealth shall be distributed to his existing heirs at that time. Anyone of them who passes away prior to this shall not inherit from him.[831]

ولا يرث المفقود من أحد مات في حال فقده

The missing person shall not inherit from anyone who passes away during the period he was missing.[832]

[831] This is because it is possible that he is alive.

[832] Since his being alive is not certain we cannot establish entitlement on the basis of doubt.

كتاب الإباق
Chapter: *Ibāq* (Fugitivity)

إذا أبق مملوك فرده رجل على مولاه من مسيرة ثلاثة أيام فصاعدا فله عليه الجعل أربعون درهما

If a slaves runs away and a person returns him to his master from a distance of three days or more, he shall be entitled to the (*ju'l*) reward of forty dirhams due on the master.

وإن رده لأقل من ذلك فبحسابه

If he returns him from (a distance) less than that the reward shall be in proportion.

وإن كانت قيمته أقل من أربعين درهما قضي له بقيمته إلا درهما

If the value of the slave is less than forty dirhams, judgement shall be passed for him to receive the slave's value less one dirham.[833]

وإن أبق من الذي رده فلا شيء عليه

If he runs away from the person who is returning him there shall be nothing due on him.[834]

وينبغي أن يشهد إذا أخذه أنه يأخذه ليرده

When he takes him he should call witnesses to the fact that he is taking him to return him (to the owner).

[833] This is so that there is some benefit for the owner in paying the reward.
[834] In other words the person returning him will not be liable for compensation.

فإن كان العبد الآبق رهنا فالجعل على المرتهن

If the runaway slave is a pledge the reward shall be due on the pledgee.[835]

[835] Since the pledgee was in possession of the slave, he shall be liable to pay the reward up to the value of the debt for which he was pledged.

كتاب إحياء الموات
Chapter: *Iḥyā al-Mawāt* (Revivification of Dead Land)

الموات ما لا ينتفع به من الأرض لانقطاع الماء عنه أو لغلبة الماء عليه
أو ما أشبه ذلك مما يمنع الزراعة

Dead[836] land is that (land) which cannot be utilized because of the water (supply) being cut off from it, the predominance of water over it, or something similar that prevents cultivation.

فما كان منها عاديا لا مالك له أو كان مملوكا في الإسلام لا يعرف له مالك بعينه
وهو بعيد من القرية بحيث إذا وقف إنسان في أقصى العامر فصاح
لم يسمع الصوت فيه فهو موات

Such land which is ancient without (having ever had) any owner, or (land which) was owned in Islam but the specific owner is not known, and which is so distant from the town that if a person had to stand at the farthest part of the inhabited area and shout, his voice will not be heard in it, shall be (regarded as) dead land.

من أحياه بإذن الإمام ملكه وإن أحياه بغير إذنه لم يملكه عند أبي حنيفة
وقال أبو يوسف ومحمد يملكه

Whoever revivifies such land with the consent of the ruler shall become the owner of it. If he revivifies it without the ruler's consent he shall not become the owner of it according to Imām Abū Ḥanīfa.[837] According to Imām Abū

[836] The land is termed "dead" in resemblance to an animal that dies and is no longer of any use.

[837] Imām Abū Ḥanīfa deems such land to be land taken as spoils of war by the Muslims and no person can acquire such property without the ruler's consent.

Yūsuf and Imām Muḥammad he shall become the owner of it.[838]

ويملك الذمي بالإحياء كما يملك المسلم

A *dhimmī* shall (also) acquire ownership by means of revivification just as a Muslim acquires ownership.[839]

ومن حجر أرضا ولم يعمرها ثلاث سنين أخذها الإمام ودفعها إلى غيره

If a person demarcates[840] a (piece of) land but does not develop[841] it for three years the ruler shall take it away from him and give it to someone else.

ولا يجوز إحياء ما قرب من العامر ويترك مرعى لأهل القرية ومطرحا لحصائدهم

(That) land which is close to the inhabited area may not be revivified and shall be left as a grazing ground for the people of the town and as a dump for their harvest.[842]

ومن حفر بئرا في برية فله حريمها فإن كانت البئر للعطن فحريمها أربعون ذراعا
وإن كانت للناضح فستون ذراعا وإن كانت عينا فحريمها ثلاثمائة ذراع
ومن أراد أن يحفر في حريمها منع منه

If a person digs a well[843] in the wilderness he shall be entitled to its sanctum.[844] If the well was for a rest-stop for camels the sanctum shall be

[838] The two Imāms deem such land to be *mubāḥ* property that can be acquired by the first person who takes possession of it.
[839] Living in the Islamic state, the *dhimmī* has similar rights to a Muslim in terms of acquiring ownership.
[840] The Arabic word "*taḥjīr*" literally means to place stones as markers around a piece of land to indicate that the land is demarcated for development or cultivation.
[841] If he does not revivify the land he does not become the owner.
[842] Such land is not deemed "dead" as it does have a use.
[843] Digging a well is also regarded as revivification and requires the consent of the ruler according to Imām Abū Ḥanīfa but not the other two Imāms.
[844] The word 'sanctum' has been used for the Arabic "*ḥarīm*" and refers to the

forty cubits. If it was for camels to draw water the sanctum shall be sixty cubits. If it was a spring the sanctum shall be three hundred cubits. If any person wishes to dig within the sanctum he shall be prohibited.

وما ترك الفرات أو الدجلة وعدل عنه فإن كان يجوز عوده إليه لم يجز إحياؤه
وإن كان لا يجوز أن يعود إليه فهو كالموات إذا لم يكن حريما لعامر
يملكه من أحياه بإذن الإمام عند الإمام

That (land) which the Euphrates and Tigris (rivers) have abandoned and the water (course) has moved away from it but it is possible that it will return then such land may not be revivified. If it is not possible that the water will return to it then it shall be (deemed) as dead land if it is not a sanctum for an inhabited area. Whoever revivifies it with the permission of the ruler shall become the owner of it according to Imām Abū Ḥanīfa.

ومن كان له نهر في أرض غيره فليس له حريمه عند أبي حنيفة إلا أن يقيم بينة على ذلك
وقال أبو يوسف ومحمد له مسناة يمشي عليها ويلقي عليها طينه

If a person has a river in someone else's land he shall not be entitled to its sanctum according to Imām Abū Ḥanīfa unless he provides evidence for the same. According to Imām Abū Yūsuf and Imām Muḥammad he shall be entitled to a jetty on which he can walk and throw its mud.[845]

protected zone around a water body (such as a well or spring) where trespassing is forbidden so that the surrounding area is not misused, polluted or congested and so that the groundwater source is not exploited.

[845] This is required for him to maintain the steady flow of water in the river.

كتاب المأذون
Chapter: *Maʾdhūn* (Authorized Slave)

إذا أذن المولى لعبده في التجارة إذنا عاما جاز تصرفه في سائر التجارات
يشتري ويبيع ويرهن ويسترهن

When the master grants his slave general authority to trade, his transactions in all commercial activities shall be valid and he may purchase, sell, and give and accept pledges.[846]

وإن أذن له في نوع منها دون غيره فهو مأذون في جمعيها

If he grants him authority only in a certain type of commercial activity, he shall be authorized in all types.[847]

وإن أذن له في شيء بعينه فليس بمأذون

If he grants him authority in a specific thing[848] he shall not be (deemed) authorized.[849]

وإقرار المأذون بالديون والغصوب جائز

The acknowledgement of debts and acts of usurpation made by an authorized slave shall be valid.[850]

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[846] In other words, he may engage in all activities that traders engage in including inter alia those mentioned in the text.

[847] Once the master authorizes him, the default interdiction on the slave is lifted and he is therefore able to transact generally.

[848] E.g. to purchase meat to eat or a garment to wear.

[849] In such a case the master is merely making use of him to perform a specific service.

[850] These are valid as they are supplementary to commercial transactions. Without

وليس له أن يتزوج ولا أن يزوج مماليكه ولا يكاتب ولا يعتق على مال
ولا يهب بعوض ولا بغير عوض إلا أن يهدي اليسير من الطعام أو يضيف من يطعمه

He may not get married, marry off his slaves, enter into a contract of *kitāba*, free a slave against consideration, grant a gift whether (in return) for an exchange or not[851] unless he gives a small amount of food or entertains someone to a meal.

وديونه متعلقة برقبته يباع للغرماء إلا أن يفديه المولى ويقسم ثمنه بينهم بالحصص
فإن فضل من ديونه شيء طولب به بعد الحرية

His debts shall be linked to his corpus and he shall be sold for (the benefit of the) creditors unless the master ransoms him.[852] The price (realized) shall be distributed amongst them proportionately. If any debt still remains it shall be claimed from him after (he attains) freedom.

وإن حجر عليه لم يصر محجورا عليه حتى يظهر الحجر بين أهل سوقه
فإن مات المولى أو جن أو لحق بدار الحرب مرتدا صار المأذون محجورا عليه

If an interdiction is placed on him[853] he shall not become interdicted until such interdiction becomes apparent amongst the people in the market. If the master dies, becomes insane, or flees to *dār al-ḥarb* as an apostate the authorized slave shall become interdicted.[854]

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his acknowledgement being valid people will avoid trading with him.

[851] These transactions are not commercial activities that traders normally engage in.

[852] The master can ransom him by paying off the debts that he owes.

[853] This refers to the master's placing an interdiction on him by withdrawing the authorization to trade.

[854] In such a case, the interdiction takes effect immediately even if the slave and the people in the market are unware of such occurrence. The reason for this is the master's eligibility is lost and thus the authorization, being a non-binding act, cannot remain.

وإن أبق العبد صار محجورا عليه

If the slave runs away he shall become interdicted.[855]

وإذا حجر عليه فإقراره جائز فيما في يده من المال عند أبي حنيفة

When an interdiction is placed on him, his acknowledgement with respect to the assets in his hand shall be valid according to Imām Abū Ḥanīfa.

وإن لزمته ديون تحيط بماله ورقبته لم يملك المولى ما في يده
فإن أعتق عبيده لم يعتقوا عند أبي حنيفة وقال أبو يوسف ومحمد يملك ما في يده

If he becomes liable for debts that encompass his assets as well as his corpus the master shall not be the owner of what is in his hand.[856] (Thus) if he[857] sets his slaves free they shall not become free according to Imām Abū Ḥanīfa. According to Imām Abū Yūsuf and Imām Muḥammad he shall (still) own what is in his hand.[858]

وإذا باع من المولى شيئا بمثل قيمته جاز فإن باعه بنقصان لم يجز فإن باعه المولى شيئا
بمثل القيمة جاز البيع فإن سلمه إليه قبل قبض الثمن بطل الثمن
وإن أمسكه في يده حتى يستوفي الثمن جاز

If he[859] sells anything to the master for the market value it shall be valid. If he sells it at a loss it shall not be valid.[860] If the master sells anything to him for the market value the sale shall be valid. If he hands it over to him before

[855] In such a case it is obvious that the master no longer approves of his entering into any transaction and he therefore becomes interdicted.
[856] In this case the rights of the creditors are preferred to that of the master just as in the case of an estate that is in debt.
[857] i.e. the master
[858] According to the two Imāms, if the master sets any of his slaves free they shall become free and the master shall be liable for their value.
[859] This refers to the authorized slave who is in debt.
[860] The invalidity is on account of suspicion of the attempt to deprive the creditors of their full due.

taking possession of the purchase price the purchase price shall become void.[861] If he withholds it in his hand until he collects the purchase price it shall be valid.[862]

وإن أعتق المولى المأذون وعليه ديون فعتقه جائز والمولى ضامن لقيمته للغرماء
وما بقي من الديون يطالب به المعتق

If the master sets the authorized slave free whilst he was liable for debts, such emancipation shall be valid and the master shall be liable for his value to the creditors.[863] Any debt that remains shall be claimed from the freed slave.

وإذا ولدت المأذونة من مولاها فذلك حجر عليها

If an authorized slave-girl gives birth to the master's child this shall be an interdiction on her.[864]

وإن أذن ولي الصبي في التجارة فهو في الشراء والبيع كالعبد المأذون
إذا كان يعقل البيع والشراء

When the guardian of a child grants authority (to the child) to trade then he shall be like an authorized slave with respect to buying and selling if he understands (the effects of a) sale and purchase.

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[861] The purchase price becomes void because a master cannot hold the right of a debt over his slave unless such a right is linked to a specific article. Since he has handed it over already to the slave the debt is no longer linked to the article.

[862] In this case the debt is still linked to the article.

[863] The master is liable because he impaired the slave to which the creditors' right was linked. In other words the creditors were in a position to sell the slave and recover their dues but the master has now caused the lapse of this option by his action of freeing the slave.

[864] This is because this is taken as an apparent indication that the master will protect her after she gives birth and will not approve of her going into the market and trading.

كتاب المزارعة

Chapter: *Muzāraʿa* (Sharecropping[865])

قال أبو حنيفة رحمه الله المزارعة بالثلث والربع باطلة وقال أبو يوسف ومحمد جائزة وهي عندهما على أربعة أوجه إذا كانت الأرض والبذر لواحد والعمل والبقر لواحد جازت المزارعة وإن كانت الأرض لواحد والعمل والبقر والبذر لآخر جازت وإن كانت الأرض والبقر والبذر لواحد والعمل لآخر جازت وإن كانت الأرض والبقر لواحد والبذر والعمل لآخر فهي باطلة

According to Imām Abū Ḥanīfa sharecropping for a third or quarter shall be void.[866]According to Imām Abū Yūsuf and Imām Muḥammad it shall be valid[867] and it is of four types according to them: If the land and the seed belong to one party and the labour and oxen are provided by another the sharecropping shall be valid.[868] If the land belongs to one party and the labour, oxen and seed to another it shall be valid.[869] If the land, oxen and

[865] Sharecropping is a system of agriculture in which a landowner allows a 'tenant' to use the land in return for a share of the crops produced on the land. It is an alternative to an *ijāra* contract in which the landlord pays the tenant a wage but gets to keep all of the crop or in which the tenant pays the landlord a fixed rent (either in cash or in kind) and he gets to keep all of the crop.

[866] This is due to the prohibition contained in the ḥadīth and the fact that it is in essence 'renting land for a part of the produce' or 'hiring a labourer for a part of the produce.' Thus it is in effect an *ijāra* (tenancy or services) agreement without the rental or fee and the date of payment being clearly defined.

[867] The view of the two Imāms is the opinion adopted in the Ḥanafī School and is based on evidence from the ḥadīth proving the legitimacy of such a contract. In addition the contract is analogous to a *Muḍāraba* contract in which one party provides capital and the other work.

[868] In this case the owner of the land will be deemed to have hired the services of the labourer together with his oxen.

[869] Here the owner of the oxen will be deemed to have hired the land in exchange for

seed belong to one party and labour is provided by another it shall be valid.[870] If the land and oxen belong to one party and the seed and labour is provided by another it shall be void.[871]

ولا تصح المزارعة إلا على مدة معلومة

Sharecropping shall only be valid if a known period is stipulated.

ومن شرائطها أن يكون الخارج مشاعا بينهما فإن شرطا لأحدهما قفزانا مسماة فهي باطلة وكذلك إن شرطا ما على الماذيانات والسواقي

One of the requirements of sharecropping is that the produce must be (shared) in common between the two parties. If they stipulate a fixed number of *qafīz's* for one of them it shall be void.[872] The same shall apply if they stipulate what is along the streams and rivulets.

وإذا صحت المزارعة فالخارج بينهما على الشرط فإن لم تخرج الأرض شيئا فلا شيء للعامل

When the sharecropping is valid the produce shall be (shared) between them according to the stipulation. If the land does not produce anything the labourer shall not be entitled to anything.[873]

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part of the produce.

[870] In this case the owner of the land will be deemed to have hired the services of the labourer in exchange for part of the produce.

[871] Here, it is not possible to deem it as a lease of the land as the oxen cannot be part of the land as the usufruct of both is different. It is also not possible to deem it as hiring the services of the labourer as he cannot be required to provide the seed.

[872] These rules are similar to those in *muḍāraba* and *sharika*, in which the stipulation of a specified number of dirhams as profit for one partner invalidates the contract. This is because such a stipulation may result in there being no sharing of profit, in the case of *muḍaraba* and *sharika*, or produce in the case of *muzāraʿa* and *musāqāh* (the next chapter.)

[873] This is because the valid agreement stated that he will receive only a part of the produce.

وإذا فسدت المزارعة فالخارج لصاحب البذر فإن كان البذر من قبل رب الأرض
فللعامل أجر مثله لا يزاد على مقدار ما شرط له من الخارج
وإن كان البذر من قبل العامل فلصاحب الأرض أجر مثلها

When the sharecropping is invalid the produce shall belong to the owner of the seed. If the seed was provided by the landowner the labourer shall be entitled to the market fee[874] which shall not exceed the amount of produce stipulated for him. If the seed was provided by the labourer the landowner shall be entitled to the market rental for the land.

وإذا عقدت المزارعة فامتنع صاحب البذر من العمل لم يجبر عليه
وإن امتنع الذي ليس من قبله البذر أجبره الحاكم على العمل

When a sharecropping agreement is contracted and the owner of the seed refuses to proceed with the labour he shall not be compelled to do so.[875] If the party that does not provide the seed refuses to proceed the judge shall compel him to provide the labour.[876]

وإذا مات أحد المتعاقدين بطلت المزارعة

When one of the two contracting parties dies the sharecropping shall become void.[877]

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[874] Since the contract is invalid, the terms of the agreement no longer apply and the labourer will be entitled to the market related fee for the services he rendered. However, this will not exceed the value of the produce stipulated for him as he had consented to that amount.

[875] This is because he can only proceed by incurring damage by destroying his seed and he cannot be compelled to do so just as the case of a person who sells a beam in the ceiling.

[876] Since no damage or loss is incurred by his proceeding, the judge will compel him to do so, unless he has a valid reason not to, in which case the contract may be cancelled similar to the case of *ijāra.*

[877] The rule here is similar to that for *ijāra.*

وإذا انقضت مدة المزارعة والزرع لم يدرك كان على المزارع أجر مثل نصيبه من الأرض
إلى أن يستحصد والنفقة على الزرع عليهما على مقدار حقوقهما

When the term of the sharecropping ends, whilst the crops are not yet ready (for harvesting), the farmer shall be liable for the market rental of his portion of the land until they are ready for harvesting. Both parties shall be liable[878] for expenses for the crops in proportion to their interests (therein.)

وأجرة الحصاد والرفاع والدياس والتذرية عليهما بالحصص
فإن شرطاه في المزارعة على العامل فسدت

Both parties shall be liable for the fee of harvesting, removal[879], threshing[880] and winnowing.[881] If they stipulate in the sharecropping agreement that the labourer shall be liable for such fee it shall be invalid.[882]

[878] This refers to after the sharecropping term has ended. Since the contract is terminated and the crops are jointly owned by the two parties, they shall be jointly liable for the expenses.

[879] This refers to removing the harvested crop from the fields to the threshing floor.

[880] Threshing refers to separating the seed heads from the stalks of the plant.

[881] Winnowing refers to separating the grain from the chaff (seed heads and straw.)

[882] This is because such a stipulation is not a requirement of the contract and is of benefit to one of the parties and therefore will invalidate the contract as discussed previously.

كتاب المساقاة
Chapter: *Musāqāh* (Irrigation Sharecropping)

قال أبو حنيفة المساقاة بجزء من الثمرة باطلة وقال أبو يوسف ومحمد جائزة
إذا ذكرا مدة معلومة وسميا جزءا من الثمرة مشاعا

According to Imām Abū Ḥanīfa irrigation sharecropping[883] for a portion of the fruit shall be void. According to Imām Abū Yūsuf and Imām Muḥammad it shall be valid if they mention a known period and fix a portion of the fruit in common.

وتجوز المساقاة في النخل والشجر والكرم والرطاب وأصول الباذنجان
فإن دفع نخلا فيه ثمره مساقاة والثمرة تزيد بالعمل جاز وإن كانت قد انتهت لم يجز

Irrigation sharecropping shall be valid in date-palms, trees, vines, vegetables and eggplants. If a person hands over a date-palm that contains fruit on the basis of irrigation sharecropping and the fruit increases by the labour it shall be valid. If it had already terminated it shall not be valid.[884]

وإذا فسدت المساقاة فللعامل أجر مثله

When the irrigation sharecropping is invalid the labourer shall be entitled to the market fee.

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[883] *Musāqāh* is essentially a sharecropping contract on lands planted with perennial crops (such as date-palms and vines) that require irrigation. The rules for *musāqāh* are very similar to those for *muzāraʿa* discussed in the previous chapter.

[884] Since the fruit are already ripe and ready the labourer's action has no effect on them and therefore the contract does not come under the definition of *musāqāh*. It therefore becomes a standard *ijāra* contract which is not valid unless the fee is specified.

وتبطل المساقاة بالموت وتفسخ بالإعذار كما تفسخ الإجارة

Irrigation sharecropping shall become void by death and it may be cancelled for valid reasons just as *ijāra* may be cancelled.[885]

[885] The same applies to *muzāraʿa.*

About the Translator

Mawlāna Fahim Hoosen was born in 1975 and raised in Stanger (Kwadukuza), Kwa Zulu Natal, South Africa. He completed the memorization of the Qurʾān in 1989 and thereafter graduated from *Madrasah Taaleemuddeen* in Isipingo Beach, Durban in 2000.

In 2002, *Mawlāna* Fahim began teaching at *Madrasa Hamidiyya* in Overport, Durban, where he taught Arabic grammar, Islamic law, Principles of Islamic law, Quranic exegesis and Islamic theology.

He completed a BA Honours in Semitic Languages and Cultures at the University of Johannesburg (2008-2010) and was certified a Shariah Advisor and Auditor (CSAA) by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in 2010.

From 2007 to 2014 he worked as a Shariah Auditor and Shariah Supervisor at Al Baraka Bank Limited, South Africa which is part of the Al Baraka Banking Group (ABG) Bahrain.

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